# Volume 68

Volume 68

68 I.A.2-16 1ST.

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GEORGE E. CLARK,
Plaintiff-Appellant,

vs.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, a banking corporation, individually and as Trustee of the Last Will and Testament of Lyman B. Kilbourne, deceased, and Trustee of the Last Will and Testament of Katherine Kilbourne; a Co-Trustee of the Last Will and Testament of Charles A. Weaver, deceased; PLEASANT C. HYSON, HELEN M. SHERIDAN, as Executrix of the Last Will and Testament of Homer C. Sheridan; MRS. CHARLES A. WEAVER, as Co-Trustee of the Last Will and Testament of Charles A. Weaver, deceased; GEORGE H. ZENDT; F. K. CROSBY, JAMES M. YOWELL, ROBERT F. CREMEENS, W. L. WIEMANN, HENRY ERDMAN, D. D. MARTIN, W. D. NEWELL, et al.,
Defendants-Appellees.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

MR. PRESIDING JUSTICE McCORMICK DELIVERED THE OPINION OF THE COURT.

The plaintiff, George E. Clark, brought an action to recover finder's fee against all of the defendants who were the owners of total of 113,400 shares of the capital stock of Omaha Cold Storage ompany, a Nebraska corporation. The case was tried before the court ith a jury and at the close of all the evidence the trial judge ntered an order dismissing the complaint against eight of the deendants in the cause and quashing the return of the service of proess on each of them. The court found that the said eight defendants ere non-residents of the State of Illinois; that none of them had, ither personally or through any agent, satisfied the minimal requireents of Section 17 of the Illinois Civil Practice Act; and that none f said defendants was personally subject to the jurisdiction of the uperior Court of Cook County, nor amenable to its process. The jury eturned a verdict for the remaining defendants upon which verdict the ourt, after denying the post-trial motion of the plaintiff, entered udgment. From that judgment and the order of the court dismissing

the non-resident defendants, this appeal was taken.

It is necessary to call attention to the allegations set out in the pleadings. The complaint was in two counts. Count I alleged that the defendants employed the plaintiff to directly or indirectly perform services on behalf of the said defendants in order to solicit buyers with whom the then owners, the defendants, could negotiate either the sale, merger, consolidation or exchange of stock of their corporation, Omaha Cold Storage Company. That company had been operating in Omaha, Nebraska since 1899.

The complaint further alleged that the plaintiff, in accordance with the agreement, solicited respective buyers and, among others, found Consolidated Foods Corporation, having its principal place of business in the City of Chicago, as a corporation with whom the defendants could negotiate for an exchange of their stock; that on the 22nd day of November 1955, there was a merger or sale of capital stock or assets of Omaha Cold Storage Company to Consolidated Foods Corporation; that the book value of the said stock was $5,250,000; that the defendant agreed to pay plaintiff, as compensation for his services in procuring the exchange of the said stock, the "fair, usual, customary and reasonable charge for like services in the City of Chicago and State of Illinois," which was $262,500.

The second count alleged a separate cause of action against Continental Illinois National Bank and Trust Company of Chicago. The count alleged that the said bank was the trustee under the will of Lyman B. Kilbourne, deceased, and Katherine Kilbourne, and was co-trustee of the last will of Charles A. Weaver, and as such held approximately 40 per cent of the total capital stock of Omaha Cold Storage Company; that at the time the bank was a creditor of Omaha Cold Storage Company in the sum of approximately $500,000, that on October 17, 1953, the bank which had engaged the services of the plaintiff to find a buyer for the stock (the details of which are

alleged in Count I) also engaged plaintiff to aid the bank in collecting from the Omaha Cold Storage Company the amount of indebtedness due it; that the fair and customary charge for like services was $50,000, and that the defendant bank agreed to pay plaintiff the $50,000. It is further alleged that by reason of the services of the plaintiff the defendant succeeded in collecting its indebtedness from the Omaha Cold Storage Company.

An answer was filed by the bank, individually and as trustee, and by George H. Zendt, Pleasant C. Hyson, Helen M. Sheridan, F. K. Crosby, James M. Yowell, Robert F. Cremeens, W. L. Wiemann, Henry Erdman, D. D. Martin, F. D. Newell, and Mrs. Charles A. Weaver, as co-trustee of the last will and testament of Charles A. Weaver, deceased. The answers denied that the plaintiff had been employed to perform services of any kind on their behalf. They also alleged, as an affirmative defense, that the plaintiff had no license under a Chicago ordinance relating to brokers. For a second affirmative defense it was alleged that the plaintiff, on or about January 8, 1956, had filed an action in the Municipal Court of Chicago, entitled "I.J. Berkson, Morris Ovson and George E. Clark v. Consolidated Foods Corporation and Nathan Cummings", that in such suit the plaintiff had alleged that he, together with Berkson and Ovson, had been employed by Consolidated Foods Corporation and Cummings to promote a merger or exchange of the stock or assets of Omaha with Consolidated Foods; that he had rendered such services, and that Consolidated had acquired the said stock and the plaintiff was guilty of a conflict of interest. The third affirmative defense was that on May 7, 1957, Consolidated paid $18,000 to Berkson, Ovson and Clark (the plaintiff here) in full satisfaction and discharge of all claims to compensation rendered by them in connection with the acquisition of the capital stock of Omaha by Consolidated. All of

the non-resident defendants also set out in substance a motion to dismiss the cause.

In its answer to Count II, the bank denied that it employed plaintiff directly or indirectly to perform services of any kind either on behalf of itself or on behalf of any other defendant.

The case went to trial before a jury and at the close of the trial the trial judge dismissed the eight defendants and the jury returned a verdict in favor of the defendants who had not been dismissed and against the plaintiff. The plaintiff filed a post-trial motion which was denied by the court, and thereupon took this appeal.

The plaintiff's theory in this case is that all of the defendants had employed his services to find a buyer for the respective number of shares of Omaha which they held; that the defendant succeeded in finding such a buyer in Consolidated; that the plaintiff should have been paid for his services under the allegations made by him in Count I of the complaint; that he should have been paid by the bank for services rendered it under Count II of the complaint; and that the eight defendants who were dismissed by the trial judge at the conclusion of all the evidence had transacted business and had sufficient minimal contacts in Illinois to bring them under Section 17 of the Illinois Civil Practice Act. A further theory of the plaintiff is that he was not a broker but was a middle man employed to find someone who would negotiate with the defendants with reference to the sale of stock.

It is essential that at the very threshold of this opinion we determine whether or not the court erred in entering an order dismissing certain non-resident defendants. As originally filed, the suit named the following non-residents as defendants: Hyson, Wiemann, Erdman, Crosby, Yowell, D.D. Martin, F.D. Newell, and Homer C. Sheridan. Homer C. Sheridan died and Helen M. Sheridan was substituted as his executrix. These defendants filed special appearances

and moved to quash return of service and to dismiss the complaint against them on the ground that the court had no jurisdiction over them since all of them were non-residents of the State of Illinois and none of them had been served with processes in this State. The motions were supported by affidavits.

On June 16, 1960, Judge Locke entered an order denying the motion to dismiss and ordering the said defendants to answer the complaint. The said defendants filed answers in which they preserved the objections set forth in their motion to quash the return of service of summons and to dismiss the complaint. At the time of the hearing before Judge Locke it was stated that there had been depositions taken of the defendants Hyson, Wiemann, Erdman, Crosby, Yowell, Martin, Helen Sheridan and Newell. The court stated at that time that it did not read the depositions.

At the close of all the evidence in the trial of the case the trial judge entertained a motion of the said defendants to quash the summons and dismiss the suit as to them, and at that time the court entered an order in which it was recited that it had heard the evidence and "read and considered the evidence depositions of each of said defendants," and found that each of the said defendants "is a non-resident of the State of Illinois;" and that none of them, either personally or through any agent, "had done any of the acts enumerated in Section 17 of the Illinois Civil Practice Act within the State of Illinois." The return of summons was quashed and the complaint dismissed as to each of these defendants.

As far as can be determined from the extraordinarily confused record presented to us, the depositions apparently were not actually admitted in evidence before the trial court. The attorney for the defendants offered to read certain parts of the depositions to the trial court. An objection was interposed by the attorney for the

plaintiff on the ground that the depositions had not been introduced in evidence. The attorney for the defendants insisted that they had been introduced in evidence on June 16, 1960, at the time of the hearing before Judge Locke. Counsel for the plaintiff agreed that they were admitted on that motion but were limited to that hearing. The court erroneously took the view that if the depositions had been admitted in a previous hearing on a motion they were a part of the records of the court and could be considered by the court as having been admitted in the trial which was then taking place before it. Since the motion to quash and dismiss was not a rehearing of the motion decided by Judge Locke but was made on the basis of the evidence adduced at the trial, the depositions could not be considered by the court unless the depositions were introduced into evidence.

The court dismissed the non-resident defendants by finding that they had not satisfied the requirements of Section 17. Section 17 of the Civil Practice Act provides as follows:

> ". . . (1) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits said person, and, if an individual, his personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of said acts:
>
> (a) The transaction of any business within this State;* * *"

The section further provides that if the person has made himself subject to the courts of the State, under the section, he may be served outside the State, and that such service shall have the same force and effect as though it had been served within the State. In the 1963 Historical and Practice Notes to the said section of the Civil Practice Act, it is said:

> "It was not the purpose of subsection (3) of section 17 to limit the assertion of jurisdiction under the section to cases in which every element of the transaction on which the claim is based occurred within the State of Illinois . . . .

> "Jurisdiction may exist under section 17 even though only some of the events upon which the cause of action is based occurred in Illinois, provided that those events amounted to the minimum contacts with the state which are essential to jurisdiction."

47 Georgetown Law Journal, 342, has an interesting and authoritative discussion of the rule which should be applied under a statute similar to this. It has been said in Nelson v. Miller, 11 Ill. 2d 378, 384, 143 N.E.2d 673, that the test should not be "mechanical or quantitative." It has further been said in Perkins v. Benguet Mining Co., 342 U. S. 437, 440, that the facts of each case determine the outcome.

On the question as to whether or not minimal contacts were established by the non-resident defendants, the facts concerning jurisdiction over each defendant must be specifically examined. Some defendants appeared at meetings in Chicago personally, some purportedly by agents. Whether evidence to substantiate the agents' authority could or could not be produced is questionable; however, the defendants argue erroneously that an agent cannot testify in open court to the fact that he was an agent. They cite Fredrich v. Wolf, 383 Ill. 638, 50 N.E. 2d 755, which does not support their argument but does no more than lay down the ordinary rule that testimony of a witness concerning an out-of-court statement made by an agent with reference to his agency is inadmissible. Without the depositions and without more evidence as to the activities of each of the defendants or their alleged agents, we must conclude that the action of the court in dismissing the non-resident defendants was erroneous.

However, there are many more reasons for reversal appearing in the record which we have referred to as extraordinary. The abstract

in this case consists of 339 pages. It is unfortunate that a case such as this should necessarily be retried. The case was tried before a jury. A large part of the abstract is taken up with remarks interposed by the trial judge. In the brief of the plaintiff-appellant ten pages are devoted to setting out allegedly erroneous and prejudicial statements made by the trial court in the presence of the jury. In some instances the court suggested that opposing counsel object to proffered evidence; in other cases the court, without objection, ruled out or struck evidence on its own motion.

During the testimony of witness George Zendt, an alleged representative of the stockholders, the court made the following statement:

> "If you want to go out and pay something, go ahead, but I am talking about confusing the jury and about these present defendants who didn't even know about that deposition, probably."

And again, the court stated that the plaintiff had not proved a thing against the present defendants. The court repeatedly criticized the method used by counsel for plaintiff in conducting the case, and on one occasion made the following statement:

> "I am not declining anything here. I want it clearly understood, however, I want to avoid putting in a lot of waste material around here, and I have not seen anything that connects these eight defendants with this case."

The court took over the examination of witnesses and, in the presence of the jury, made several comments on the relevancy of the evidence—something which was entirely beyond the prerogative of a trial judge. The court kept insisting that counsel for the defendants put the plaintiff on the stand, and made the remark that there had been a lot of evidence brought in which amounted to nothing.

It is not necessary to reiterate any further remarks of the trial court, but from a reading of the abstract and record, it

would appear that from the very beginning of the case the trial court made remarks such as those we have set out, which could do nothing less than prejudice the average juryman. It has been said that a juror looks carefully at the court's attitude towards a case and is many times influenced by that attitude. In People v. Bernstein, 250 Ill. 63, 95 N.E.50, the Supreme Court said that a trial court must not forget the function of a judge and assume that of an advocate. On a retrial, undoubtedly these errors will not again come into the case.

The plaintiff's theory was—and he so pleaded—that the plaintiff had been employed by the defendants to "find a prospective purchaser for all of the stock of the Omaha Cold Storage Company"; that once such prospective purchaser was found by the plaintiff, any further negotiations would be between the purchaser and the stockholders or their representatives. The plaintiff so testified, and his testimony is corroborated to some degree by defense witnesses. The plaintiff contended that he found a prospective purchaser and that after negotiation with that purchaser by the stockholders, the entire stock of the Omaha Cold Storage Company was sold.

The plaintiff testified that he made contact with I. J. Berkson who was acting as attorney for Consolidated Foods. When Berkson knew that the Omaha Cold Storage Company stock could be purchased, Consolidated Foods offered him a fee to secure the stock. Berkson then agreed with the plaintiff that he would give him a third of the fee which he would receive from Consolidated in case the purchase of the Omaha stock went through. Subsequently, Consolidated apparently refused to pay the fee claimed and a suit was brought in the Municipal Court of Chicago on February 8, 1956, in which the plaintiffs were Berkson, Ovson and Clark, the latter being the plaintiff in the instant case. The defendants were the Consolidated Foods Corporation

and Nathan Cummings. The suit was settled for $18,000.

Plaintiff's counsel in the instant case was the attorney for Berkson, Ovson and Clark in that case, and Clark received a third of the settlement, minus his share of the legal expenses. The defendants here argue that by bringing such a suit and accepting a fee from the purchaser of the Omaha Cold Storage stock, the plaintiff was debarred and estopped from proceeding with the instant suit. That is an incorrect assumption. If the contract between the plaintiff and the defendants was merely to "find" a purchaser for their stock, once the plaintiff had found and produced a person who later became the purchaser, he had fulfilled his contract and any further agreement which he made with the purchaser with regard to the transaction was of no concern to the defendants. Their contract with the plaintiff had been fulfilled. Nor can it be said that by joining as a plaintiff in the suit against Consolidated Foods the plaintiff created a conflict of interests. There could be no conflict of interests because the agreement between the plaintiff and the defendants—assuming that such agreement and the contacts had been proved—was water over the dam, and the settlement of that suit could in no way be regarded as an accord and satisfaction in the instant suit.

Under the pleadings of the plaintiff he could either recover on an express contract or on a quantum meruit. In an endeavor to prove the value of the services the plaintiff attempted to cross examine a witness concerning the alleged existence of a custom to pay a fee for the services rendered by a finder. Under the circumstances involved in the instant case, the court took the view that such a custom could be proved only by an expert, and refused to permit testimony with regard to such custom. In that the court was in error. Wilson v. Bauman, 80 Ill. 493. The court did permit one

witness to testify that he knew of the existence of such a custom, but erroneously refused to permit further evidence in regard thereto.

The trial court also refused, on cross-examination, to permit Zendt—called by the plaintiff as an adverse witness—to state whether or not he had ever discussed with Sheridan the possibility of the sale of his stock in the Omaha Cold Storage Company. The court sustained an objection to this question on the ground that such testimony was prohibited under the provisions of the statute known as the "Dead Man's Act" (Ch. 51, Sec. 2, Ill. Rev. Stat. 1953). In Clark v. A. Bazzoni & Co., Inc., 7 Ill. App. 2d 334, 129 N.E.2d 435, a case where the plaintiff had sued a defendant corporation, the owner of a truck, and had joined the administrator of the estate of the deceased driver, its employee, on the trial the plaintiff was permitted to testify over the objection that it was adverse to the administrator. The Appellate Court held that there was no merit in the contention that the plaintiff's testimony violated the Dead Man's Act. The testimony was admissible against the corporation and the character of this evidence is not changed by the presence of the administrator as a party. See also Creighton v. Elgin, 387 Ill. 592, 56 N.E.2d 825. In the instant case the trial court erred in refusing to permit testimony concerning conversations with a deceased defendant on the ground that it was forbidden by the Dead Man's Act. The evidence should have been admitted together with a proper instruction.

The jury returned a verdict in which it found "the issues in favor of all the defendants who have not been dismissed from this case." Nowhere in the record does it appear that the court informed the jury as to which defendants had been dismissed. The failure to so inform the jury was prejudicial. The jury also returned a separate verdict in favor of the defendant, Continental Illinois National

Bank and Trust Company of Chicago, a banking corporation, individually and as trustee, and against the plaintiff. Judgment was entered on the verdicts and the plaintiff filed a motion for a new trial.

Among other things set up in that motion were objections to the court's refusal to permit a number of documents and telephone calls to be admitted in evidence. These documents are summarized in the motion, but they appear no place in the record. A motion for a new trial cannot take the place of the proper presentation of the evidence to which the trial court sustained an objection. That evidence should have appeared in the record and been properly abstracted, and we are not considering plaintiff's objections in that regard.

The defendants also urge, as an additional ground why the plaintiff, Clark, could not recover was that he was purporting to act as a general broker and was not so licensed under the Municipal Code of Chicago. It is of course true that an unlicensed broker could not recover for services rendered. In re Winston v. Kaspar American State Bank, 36 Ill. App. 2d 423, 184 N.E.2d 725. A "general broker" is defined in the Municipal Code of Chicago as "any person other than an employe of the principal for whom the business is done that negotiates, buys, sells, trades, leases, or handles for another, on a commission basis, or on the basis of compensation in proportion to the amount of the transaction, any stocks, . . ." Under the claim of the plaintiff as alleged in his complaint he would not fall within that definition. In support of the complaint there was the plaintiff's testimony that he was only to find someone who would be interested in purchasing the defendants' stock and it was specifically understood that he would not assist in the drawing of a contract or negotiate with the parties once he had got them together.

In The City of Chicago v. Barnett, 404 Ill. 136, 88 N.E.2d 477, it is pointed out that there must be an element of negotiation in order to bring a person within the definition of a broker as defined in the Municipal Code. Whether a person is a broker is a question of law based on fact. Under the circumstances of this case, Clark could not be considered a broker requiring a license under the Code. City of Chicago v. Dollarhide, 255 Ill. App. 350.

The plaintiff also objects to certain instructions given and refused by the court. We will not discuss these alleged errors since on a retrial of the case this matter can be properly taken care of. The judgment is reversed and the cause remanded for a new trial. The order of April 18, 1963, dismissing certain defendants, is also reversed.

REVERSED AND REMANDED.

ENGLISH, J., and DRUCKER, J., concur.

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| GEORGE E. CLARK,<br>Plaintiff-Appellant,<br><br>vs.<br><br>CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, a banking corporation, individually and as Trustee of the Last Will and Testament of Lyman B. Kilbourne, deceased, and Trustee of the Last Will and Testament of Katherine Kilbourne; a Co-Trustee of the Last Will and Testament of Charles A. Weaver, deceased; PLEASANT C. HYSON, HELEN M. SHERIDAN, as Executrix of the Last Will and Testament of Homer C. Sheridan; MRS. CHARLES A. WEAVER, as Co-Trustee of the Last Will and Testament of Charles A. Weaver, deceased; GEORGE H. ZENDT; F. K. CROSBY, JAMES M. YOWELL, ROBERT P. CREMEENS, W. L. WIEMANN, HENRY ERDMAN, D. D. MARTIN, F. D. NEWELL, et al.,<br>Defendants-Appellees. | APPEAL FROM<br><br>SUPERIOR COURT<br><br>COOK COUNTY |

ON REHEARING

MR. JUSTICE McCORMICK DELIVERED THE OPINION OF THE COURT.

This appeal was taken (1) from a judgment entered on a verdict of the jury in favor of defendants, Continental Illinois National Bank and Trust Company of Chicago, a banking corporation, individually, and as trustee under the last will and testament of Lyman B. Kilbourne, and trustee under the last will and testament of Katherine Kilbourne, and as co-trustee of the last will and testament of Charles A. Weaver; Mrs. Charles A. Weaver, as co-trustee of the last will and testament of Charles A. Weaver, deceased; George H. Zendt and Robert P. Cremeens; and (2) from an order quashing service of summons and dismissing complaint as to eight other defendants; namely, W. L. Wiemann, Pleasant C. Hyson, Henry Erdman, James M. Yowell, F. K. Crosby, D. D. Martin, F. D. Newell, and Helen M. Sheridan, as executrix of the last will and testament of Homer C. Sheridan, hereinafter referred to as "non-resident defendants."

In 1958 plaintiff filed a complaint in the Circuit Court of Cook County, alleging in Count I that on or about October 17, 1953, he had been employed by all the defendants to solicit prospects to purchase their stock in Omaha Cold Storage Company of Omaha, Nebraska; that he "found" Consolidated Foods Corporation, whose principal office is in Chicago, and that on November 22, 1955, there was a merger or exchange or sale of 133,400 shares of Omaha to Consolidated; that the book value of Omaha as represented by these shares was $5,250,000; that the defendants had agreed to pay as compensation for plaintiff's services the fair, usual, customary and reasonable charges for like services in Chicago; that $262,500 was such a fair, reasonable and customary charge; and that the defendants had refused to pay that or any other sum.

We will first consider the order quashing service of summons and dismissing the complaint as to the eight non-resident defendants. In Count I of his complaint the plaintiff alleged that the eight non-resident defendants "engaged in the transaction of business within this State as hereinafter set forth." The record shows that on June 16, 1960, Judge Locke denied a motion on behalf of the eight non-resident defendants to quash service upon them and to dismiss the suit as to them.

In the counter-affidavit filed by the plaintiff before Judge Locke it was averred that on October 17, 1953,

(1) George Zendt, secretary, director and stockholder of Omaha Cold Storage Company, employed plaintiff "in his own behalf and in behalf of all the other stockholders of Omaha Cold Storage Company"; that

(2) Harold L. Weiss, as vice-president of the Continental Illinois National Bank and Trust Company of Chicago, as trustee in the Kilbourne and Weaver estates, holders of 27 per cent of the total of the outstanding shares of capital stock, employed Clark for the same purposes as did Zendt in behalf of the trustees as stockholders and in behalf of other stockholders of Omaha to work out a sale or exchange of stock.

In their affidavits and depositions each of the eight non-resident defendants denied that he had ever employed the plaintiff, either in Illinois or elsewhere, either personally or through an agent, to find a purchaser for his shares of stock in Omaha. Plaintiff has not adduced any evidence to show that on October 17, 1953, Zendt and Weiss represented or purported to represent any of the non-resident defendants; nor is there any evidence in the record that there was a ratification by any of the non-resident defendants of the conduct of Zendt and Weiss on October 17, 1953.[1]

The record is replete with incidents occurring from May 24, 1954, to October 6, 1955, which show that some of the defendants were present in Chicago and that meetings were had during that period in Omaha and Chicago regarding a proposed deal between shareholders of Omaha and Consolidated. We cannot see where the plaintiff's position was helped insofar as the motions to quash and dismiss are concerned. Plaintiff did not meet his burden under Section 17 of the Civil

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1. Defendants Hyson, Wiemann, Erdman and Newell were never in Illinois and had no contact whatsoever with plaintiff. Plaintiff claims that two men were in Chicago in June of 1954 representing Hyson but there was no evidence of their agency and Hyson denied that he ever authorized anyone to employ plaintiff. Crosby, Martin and Yowell were in Chicago in October of 1955 (two years after the contract with plaintiff was allegedly entered into) but had no contact with plaintiff except for a meeting between plaintiff and Martin on September 8, 1954, the details of which are not disclosed. Mrs. Sheridan admittedly was never in Illinois and came into the case only after the death of her husband, Homer Sheridan. According to plaintiff, Homer Sheridan first came to Chicago in June, 1954, to discuss a deal with Consolidated. Plaintiff was present at one meeting with Sheridan at which information and statistics were produced. Except for plaintiff's conclusion that Sheridan was acting for all the defendants, there is no affirmative evidence of any dealings between Sheridan and plaintiff. Plaintiff in his affidavits states at one point that Sheridan was representative of all other stockholders and at another point that he controlled 85% of the stock. None of the stockholders are named. Sheridan was in Chicago on many occasions after June 1954, but a close scrutiny of plaintiff's affidavits fails to disclose even a shred of evidence that Sheridan was acting for any specific defendants, that he had been authorized to so act or that he had any dealings with plaintiff personally regarding plaintiff's appointment. There are also references in plaintiff's affidavits of various proposed commissions in 1955 ranging from $25,000 to $1.00 per share.

Practice Act[2] of showing that defendants on or before October 17, 1953, were "transacting business" in Illinois, and that this cause of action, based as it is on an alleged employment contract of October 17, 1953, arose from such events.

In Magnaflux Corporation v. Foerster, 223 F. Supp. 552 (N.D. Ill., 1963), the court states at page 558:

> "Section 17 specifically qualifies its coverage in sub-section (3):
>
> > 'Only causes of action arising from acts enumerated herein [one of which is the transaction of business] may be asserted against a defendant in an action in which jurisdiction over him is based upon this section.'
>
> "The act does not confer jurisdiction upon a defendant unless it does two things: (a) enters into Illinois, and (b) to transact the business from which the cause of action arises. If a defendant transacts business with A, which has absolutely no relation with its dealings with B, B cannot obtain jurisdiction over the person of the defendant under the Illinois statute on the specific theory that the defendant has transacted business."

Depositions and affidavits in support of the first motion to quash and dismiss were filed. On the second hearing of these motions before the trial judge the plaintiff objected to the use of depositions, and argued that they had not been formally introduced into evidence. Defendants' counsel then explained to the court that after Judge Locke's decision on the first motions there had been a stipulation that the depositions "were all introduced and offered in evidence

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2. "(1) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits said person, and, if an individual, his personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of said acts:
   (a) The transaction of any business within this State;
   * * *
   "(3) Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this section."

and received in evidence and are a part of the record in this cause." Plaintiff's attorney then answered, "Then I object to reading any portion [of the deposition]. The whole deposition will have to be read." Even if the stipulation was considered as referring only to the first hearing--and we do not so interpret it--proper objection was not made to the use of the depositions.

After the ruling of Judge Locke the eight non-resident defendants filed a defense to the merits. Prior to the commencement of the trial the eight defendants before the trial judge (not Judge Locke) again moved to quash the service and dismiss the case against them. The plaintiff objected. The court reserved the ruling, but after the close of all the evidence the trial judge allowed the motion and entered the order appealed from. There was no objection by plaintiff to the authority of the court to enter the order or to the right of the trial judge to hear these motions. In his appeal the plaintiff only urges that the judge erred in dismissing these defendants.

From the facts as they appear in the record we must conclude that the court had no jurisdiction over the person of any of the eight non-resident defendants. The order of the trial court in quashing service and dismissing the complaint as to them is affirmed.

We will now discuss the judgment entered under Count I in favor of the resident defendants and against the plaintiff. The abstract in this case consists of 339 pages. It is unfortunate that a case such as this should necessarily be retried. The case was tried before a jury. A large part of the abstract is taken up with remarks interposed by the trial judge. The plaintiff-appellant devotes ten pages of his brief to setting out allegedly erroneous and prejudicial statements made by the trial court in the presence of the jury. In some instances the court suggested that opposing counsel object to proffered evidence; in other cases the court, without objection,

ruled out or struck evidence on its own motion. The court took over the examination of the witnesses and, in the presence of the jury, made several comments on the relevancy of the evidence--something which was entirely beyond the prerogative of a trial judge. The court kept insisting that counsel for the defendants put the plaintiff on the stand, and made the remark that there had been a lot of evidence brought in which amounted to nothing. From a reading of the abstract and record, it would appear that from the very beginning of the case the trial court made remarks which could do nothing less than prejudice the average juryman. It has been said that a juror looks carefully at the court's attitude towards a case and is many times influenced by that attitude. In People v. Bernstein, 250 Ill. 63, 95 N.E. 50, the Supreme Court said that a trial court must not forget the function of a judge and assume that of an advocate. Under the circumstances appearing in the record in this case with reference to the remarks of the trial judge in the presence of the jury, the plaintiff did not have a fair trial. Undoubtedly these errors will not again come into the case on a retrial.

The plaintiff's theory was--and so he pleaded--that the plaintiff had been employed by the defendants to "find a prospective purchaser for all of the stock of the Omaha Cold Storage Company"; that once such prospective purchaser was found by the plaintiff, any further negotiations would be between the purchaser and the stockholders or their representatives. The plaintiff so testified, and his testimony is corroborated to some degree by defense witnesses. The plaintiff contended that he found a prospective purchaser and that after negotiation with that purchaser by the stockholders, the entire stock of the Omaha Cold Storage Company was sold.

Zendt testified that he had a conversation with Clark with reference to a sale of the capital stock of Omaha and that at that

time Zendt was a director and stockholder of Omaha; that he took Clark to meet Weis, who was second vice-president of Continental Illinois National Bank and Trust Company of Chicago, and that he went with Clark to the office of I. J. Berkson, a lawyer, who later told him he thought he had a purchaser in the Consolidated Foods Corporation. In other words, he found Berkson and interested him in the purchase by Consolidated of the Omaha stock. Zendt stated that in the conversation between Zendt, Clark and Weis, Weis told Clark that in the event he found a purchaser, "we do not want you to do any negotiating." When this conversation was introduced in evidence the court intervened with remarks in the presence of the jury which were highly prejudicial.

Weis testified that Zendt introduced him to Clark at the Bank in October 1953; that in April or May of 1954 he learned from Zendt that Consolidated was interested as a possible purchaser; and that at a meeting of the Board of Directors of Omaha, held in Omaha, Nebraska, on June 22, 1954 [which meeting Weis attended], Zendt explained the finding of Consolidated Foods by Clark and told the Board of Directors that he had been introduced to I. J. Berkson by Clark, and that Berkson had expressed the feeling that the Consolidated Foods would be interested as a possible purchaser. Weis also stated that the Bank was trustee of the Weaver and Kilbourne interests. He further testified that at a directors' meeting on June 30, 1955, in Omaha there was a discussion with reference to the payment of finder's fee in connection with the sale of the Omaha stock. There was sufficient evidence with reference to an agreement to pay a finder's fee to go to the jury.

When the court sustained the motion to dismiss the suit as to the eight non-resident defendants, the jury was informed that certain defendants had been dismissed, but was not informed as to who the defendants were. The jury returned two verdicts; one:

> "We, the Jury find in favor of the Defendant, Continental Illinois National Bank and Trust Company of Chicago, a banking corporation, individually and as trustee, and against the plaintiff George E. Clark."

The other verdict was:

> "We, the jury find the issues in favor of all of the defendants who have not been dismissed from this case and against the plaintiff, George E. Clark."

On these verdicts, on April 19, 1963, the court entered a judgment order in part, as follows:

> "The Jury, after hearing all of the evidence adduced say, 'We, the jury find the issues in favor of all of the defendants who have not been dismissed from this case and against the plaintiff, George E. Clark.' Judgment is now entered upon said verdict.
>
> "Whereupon it is considered by the Court that the plaintiff George E. Clark, take nothing by the aforesaid action, but that the defendant Continental Illinois National Bank and Trust Company of Chicago a Banking Corporation, Individually and as Trustee, etc., et al., go hence without day and do have and recover of and from the plaintiff their costs and charges in this behalf expended and have execution therefor.
>
> "The Jury, also say 'We, the Jury find in favor of the defendant, Continental Illinois National Bank and Trust Company of Chicago, a Banking Corporation, Individually and as Trustee, and against the plaintiff George E. Clark.' Judgment is now entered upon said verdict.
>
> "Whereupon it is considered by the Court that the plaintiff George E. Clark, take nothing by the aforesaid action, but that the defendant Continental Illinois National Bank and Trust Company of Chicago, a Banking Corporation, Individually and as Trustee, go hence without day and do have and recover of and from the plaintiff their costs and charges in this behalf expended and have execution therefor."

The jury should have been informed, in order to intelligently consider the issues before it, of the defendants who had been dismissed from the case. They were not so told. Under such circumstances, it is difficult to see how the jury, even if it were possible for them to remember all the evidence in the record, could intelligently consider the case.

The court erred in denying plaintiff the right to show evidence, by witnesses Zendt, Weis and Clark, of custom and usage in the payment

of finder's fees under the circumstances developed in the evidence in this case. The court erroneously held that such usage and custom could only be proved by expert witnesses, which is directly contrary to the holding in Wilson v. Bauman, 80 Ill. 493.

The plaintiff in his motion for new trial objected to the court's refusal to permit a number of documents and telephone calls to be admitted in evidence. These documents are summarized in the motion, but they appear no place in the record. A motion for a new trial cannot take the place of the proper presentation of the evidence to which the trial court sustained an objection. That evidence should have appeared in the record and been properly abstracted, and we are not considering plaintiff's objections in that regard.

The defendants also further urge that Clark could not recover because he was purporting to act as a general broker and was not so licensed under the Municipal Code of Chicago. It is of course true that an unlicensed broker could not recover for services rendered. In re Winston v. Kaspar American State Bank, 36 Ill. App. 2d 423, 184 N.E.2d 725. A "general broker" is defined in the Municipal Code of Chicago as "any person other than an employe of the principal for whom the business is done that negotiates, buys, sells, trades, leases, or handles for another, on a commission basis, or on the basis of compensation in proportion to the amount of the transaction, any stocks . . . ." Under the claim of the plaintiff as alleged in his complaint he would not fall within that definition. In support of the complaint there was the plaintiff's testimony that he was only to find someone who would be interested in purchasing the defendants' stock and it was specifically understood that he would not assist in the drawing of a contract or negotiate with the parties once he had got them together.

In The City of Chicago v. Barnett, 404 Ill. 136, 88 N.E.2d 477, it is pointed out that there must be an element of negotiation in

order to bring a person within the definition of a broker as defined in the Municipal Code. Whether a person is a broker is a question of law based on fact. Under the circumstances of this case, Clark could not be considered a broker requiring a license under the Code. City of Chicago v. Dollarhide, 255 Ill. App. 350.

The special defense pleaded is that Clark represented persons whose interests in the transaction conflicted, and that there was an accord and satisfaction. A suit had been brought in the Municipal Court of Chicago on February 8, 1956, in which the plaintiffs were Berkson, Ovson and Clark, the latter being the plaintiff in the instant case. The defendants were Consolidated Foods and Nathan Cummings. The basis of the suit was that Clark claimed he had "found" I. J. Berkson and Morris Ovson, who had interested Consolidated Foods in purchasing the capital stock of Omaha, and that Consolidated Foods had agreed to pay Berkson and Ovson for their services in the transaction. Berkson and Ovson in turn agreed to cut Clark in on a third of the money they were to receive from Consolidated Foods. The suit was settled for $18,000. Plaintiff's counsel in the instant case was the attorney for Berkson, Ovson and Clark in that case, and Clark received a third of the settlement, minus his share of the legal expenses. The defendants here argue that by bringing such a suit and accepting a fee from the purchaser of the Omaha Cold Storage stock, the plaintiff was debarred and estopped from proceeding with the instant suit. That is an incorrect assumption. If the contract between the plaintiff and the defendants was merely to "find" a purchaser for their stock, once the plaintiff had found and produced a person who later became the purchaser, he had fulfilled his contract and any further agreement which he made with the purchaser with regard to the transaction was of no concern to the defendants. Their contract with the plaintiff had been fulfilled. Nor can it be said

that by joining as a plaintiff in the suit against Consolidated Foods the plaintiff represented persons whose interests conflicted, because the agreement between the plaintiff and the defendants--assuming that such agreement and the contracts had been proved--was water over the dam. The settlement of the Municipal Court suit could in no way be regarded as an accord and satisfaction in the instant suit.

In the petition for rehearing it is urged that the court cannot consider the trial court's sustaining objections to the testimony of witnesses as error unless an offer of proof was made. We know of no rule, nor have we been able to find any case in which an offer of proof was required when the witness testifying was either an adverse witness or was being cross-examined. In 34 I.L.P. Trial § 44, the statement is made:

> "Generally, where a question addressed to a party's own witness does not suggest the answer, and an objection thereto has been sustained by the court, an offer of proof showing what testimony is sought to be elicited, its purpose, and its relevancy, competency, and materiality, should be made and, unless a proper offer is made, the exclusion of the evidence is proper."

The questions to which the court sustained objections were with reference to the custom of paying a finder's fee. No offer of proof was necessary since the questions were asked of adverse witnesses, or in the case of Clark, the purport of the question was clearly apparent. The plaintiff also objects to certain instructions given and refused by the court. We will not discuss these alleged errors since on a retrial of the case these matters can properly be taken care of.

The complaint contained two counts. In Count II it is alleged that the Continental Illinois National Bank and Trust Company of Chicago, as an individual, entered into an agreement with the plaintiff to pay him for helping the Bank collect from the Omaha Cold Storage Company an indebtedness due the Bank in the sum of $500,000.

The evidence adduced by the plaintiff as to this allegation is vague and indefinite, and there is a direct denial on the part of the agents of the defendant. Because of the confused verdicts and judgment orders, it is not perfectly clear, but it is sufficiently apparent that the judgment in favor of the Continental Illinois National Bank and Trust Company of Chicago was based on the second count. After a careful examination of the evidence we hold that the judgment in the trial court in favor of the defendant, Continental Illinois National Bank and Trust Company of Chicago, individually, should be sustained, and it is affirmed.

The judgment order of the court dismissing the complaint as to the eight non-resident defendants is affirmed.

The judgment in favor of the defendants, Continental Illinois National Bank and Trust Company of Chicago, as trustee under the last will and testament of Lyman B. Kilbourne, deceased, and trustee under the last will and testament of Katherine Kilbourne, deceased, and co-trustee of the last will and testament of Charles A. Weaver, deceased; Mrs. Charles A. Weaver, co-trustee under the last will and testament of Charles A. Weaver, deceased; and Robert P. Cremeens and George H. Zendt, is reversed, and the cause is remanded for a new trial.

AFFIRMED IN PART.

REVERSED IN PART AND REMANDED.

DRUCKER, P.J., and ENGLISH, J., concur.

March 17, 1966

NO. 65-7

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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| ERNEST H. STRATMEYER,<br><br>Plaintiff,<br><br>vs.<br><br>CHAMPION LIFE INSURANCE COMPANY,<br><br>Defendant,<br><br>vs.<br><br>CHARLES F. SANBORN,<br><br>Third Party Defendant. | Appeal from the Circuit Court of Montgomery County.<br><br>Honorable Dan Dailey, Judge Presiding. |

Per curiam:

This cause of action arises from the purchase by plaintiff of shares of common stock issued by defendant. In his complaint, as amended, plaintiff alleges that on four separate occasions he paid to defendant sums of money aggregating $8,000.00, on each occasion the parties executed a document bearing the heading "Subscription agreement and interim re-

ceipt", plaintiff received certificates for shares based upon payment of $6,000.00, that despite repeated demands defendant has failed and refused to refund the sum of $2,000.00 or issue additional shares. Plaintiff further alleges that the failure to deliver the shares of stock "is fraudulent and a misrepresentation made to the plaintiff as to his insurance program and is a violation and breach of the overall agreement", and that plaintiff "has been defrauded of $8,000.00 and sustained other damages".

A jury trial resulted in a verdict for plaintiff in the amount of $12,000.00. Defendant filed a post trial motion praying in the alternative for arrest of judgment, judgment notwithstanding the verdict, remittitur, or a new trial. The trial court granted a new trial and denied the other portions of the motion. This court allowed plaintiff's petition for leave to appeal from the order granting the new trial.

The trial court gave no reason for its action in granting the new trial. A memorandum stating the basis for its ruling, as permitted by Supreme Court Rule 36 (1) would be of material assistance to a reviewing court, and in the interest of expeditious determination of appeals, such memorandum should be in-

cluded in the record. Morella v. Melrose Park Cab Company, 212 N. E. 2d 106, Lukich v. Angeli, 31 Ill. App. 2d 20.

A recital of the evidence is not essential to this opinion, nor is its inclusion here likely to be of precedential value, in view of the improbability that a situation so unusual as that revealed in this record will again arise.

On the issue of whether defendant failed to deliver to plaintiff 2000 shares of stock for which he subscribed and paid, the evidence is such that there appears to be no question of the propriety of the jury's verdict and insofar as this issue is concerned, the court erred in granting defendant a new trial. As to the issue of damages, we conclude, after reviewing the record, that the evidence will not support the verdict, in the amount of $12,000.00. On the record here presented, the proper order to be entered is to grant a new trial on the issue of damages only. The order granting the defendant a new trial is modified to the extent that the new trial is granted solely on the issue of damages, and as modified, is affirmed, and the cause remanded to the Circuit Court of Montgomery

County for a new trial on the issue of damages only.

Order affirmed as modified, and cause remanded.

PUBLISH ABSTRACT ONLY

Filed March 25, 1966

NO. 65-10.

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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| PEOPLE OF THE STATE OF ILLINOIS, Appellee, vs. ALBERT SCOTT, Appellant. | ) | Appeal to the Appellate Court of Illinois, Fifth District, from the Circuit Court of St. Clair County. Honorable Carl Becker, Judge Presiding. |

Goldenhersh, P. J.

Defendant, Albert Scott, was tried by jury in the Circuit Court of St. Clair County and convicted of the crime of Armed Robbery (Ch. 38, sec. 18-2, Ill. Rev. Stat. 1963). He was sentenced to the penitentiary for a term of not less than 15 nor more than 20 years.

Approximately six months after defendant was sentenced he filed, pro se, a petition for leave to appeal in this court. Because the record in the trial court failed to disclose that defendant had been advised of his right to appeal as required by Rule 27 (6) of the Supreme Court Rules, this court allowed the petition and appointed counsel for defendant.

Defendant contends that the evidence of identification is insufficient to sustain the conviction and is so improbable and unsatisfactory as to raise a reasonable doubt of defendant's guilt.

The evidence shows that at approximately 4:10 P.M. on April 18, 1964, a man, later identified as defendant entered the premises occupied by Alfred Kay, Inc., d/b/a Mark's Loan Company in East St. Louis. He asked to see a watch, a diamond ring and a television set. After placing a wrist watch on his wrist, and a diamond ring on his finger, he drew a pistol, grabbed Mr. Kay, the store manager by the arm, struck him with a pistol, told him that this was a hold-up, and if he did not do as he was told, he would be killed. At that time a retired police officer, a friend of Mr. Kay, was visiting in the store. He had a pistol with him, and when he saw what was happening, he drew his pistol and ordered the man to release Kay. The bandit told the retired officer to drop his gun on the counter or he would kill Kay. The retired officer obeyed, the bandit took all of the paper money and a check out of a cash drawer, put it in a green bag lying near the cash drawer, and left.

The retired officer grabbed a gun from a case in the store and started in pursuit. A police call was issued and a police officer pursued the running bandit, admittedly lost

sight of him for a short period of time, and finally, with the assistance of another officer who arrived at the scene, arrested defendant, some five minutes after the holdup, approximately 6 or 7 blocks from the store premises where the holdup had taken place. Defendant was taken to the police station and shortly thereafter was identified by Kay and the retired police officer as the culprit who had perpetrated the crime. At the time of the arrest, defendant was carrying a green bag containing $877.00 in currency, and a check payable to Alfred Kay, Inc., and was wearing a ring identified by Kay as the one taken in the robbery. Mr. Kay testified that he could ascertain the amount taken from the store's daily records of receipts and disbursements and the amount shown by those records was $877.00, the exact amount found in defendant's possession. The watch taken by the robber was never found.

Defendant's chief contention on the issue of identification is that the witnesses at the trial, in identifying defendant as the robber testified that he had a mustache, whereas in the reports to the police immediately after the occurrence, no one mentioned that the man had a mustache. Other than that discrepancy, the general description of the culprit's size and the clothes worn by him fit the description of defendant and the manner in which he was attired at the time of

the arrest.

As to the issue raised by defendant on the sufficiency of his identification, the sufficiency thereof was a question of fact for the jury. The People v. Brengettsy, 25 Ill. 2d 228. A reviewing court will not reverse a conviction on the question of the sufficiency of identification unless it is contrary to the weight of the evidence, or so unsatisfactory as to justify a reasonable doubt of defendant's guilt. The People v. Keagle, 7 Ill. 2d 408.

Defendant contends further that the money, ring, bag and pistol taken from defendant at the time of the arrest should not have been admitted into evidence because the arresting officers did not have reasonable grounds to believe that defendant was committing, or had committed a crime and the arrest was, therefore, violative of the provisions of Ch. 38, sec. 107-2(c), Ill. Rev. Stat. 1963. Where the police officer within minutes of a robbery saw and followed a running man who fit the general description reported by witnesses to the crime, and who was dressed in the same type and color clothing described by the witnesses, the arresting officer had reasonable grounds to believe defendant had committed an offense. There was no error in admitting the exhibits into evidence.

The court expresses its thanks to appointed counsel

for an able presentation of this case. The judgment of the Circuit Court of St. Clair County is affirmed.

Judgment Affirmed.

Concur: Hon. George J. Moran, J.

Concur: Hon. Edward C. Eberspacher, J.

PUBLISH ABSTRACT ONLY

65-86 Filed March 29, 1966

68 I.A.2 112

NO. 65-86.

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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| DOROTHY WAGNER, Plaintiff-Appellee, vs. MENDELL WAGNER, Defendant-Appellant. | Appeal from the Circuit Court of White County, Illinois. Honorable Charles E. Jones, Judge Presiding. |

Goldenhersh, P. J.

Defendant appeals from those portions of the decree of the Circuit Court of White County which find plaintiff unable to work at steady employment and order him to pay alimony, and the premiums required to provide medical and hospital insurance for plaintiff.

The parties were married in 1945, separated in 1961, and are childless. Defendant operates a grocery store in Carmi. Plaintiff has had trouble with her back for a number of years and an orthopedic surgeon testified about several surgical procedures which had been performed, and that she was not able to do any work "in which she can be depended upon if she has to be up at all". Plaintiff, because of her

disability, has been receiving Social Security payments of $78.00 per month.

Defendant testified that the oil business in the Carmi area has declined, and his income from the operation of his grocery business has decreased. Copies of income tax returns and other financial information were received in evidence.

"In determining whether an award of alimony is excessive, consideration must be given to the means of the parties, their needs and their station in life (See Everett vs. Everett, 25 Ill. 2nd 342)". Schwarz vs. Schwarz, 27 Ill. 2nd 140, 148. The amount of alimony to be awarded rests within the sound legal discretion of the trial court. Benham vs. Benham, 208 Ill. 98; Canady vs. Canady, 30 Ill. 2nd 440.

Upon review of the record we cannot say that there is no evidentiary basis for the award of alimony, or that the trial court, in fixing the amount, abused its discretion. The decree of the Circuit Court of White County is affirmed.

Decree Affirmed.

Concur: Hon. George J. Moran, J.

Concur: Hon. Edward C. Eberspacher, J.

PUBLISH ABSTRACT ONLY

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

General No. 10666 Agenda No. 5

Leon Hall,

Plaintiff-Appellee

vs.

Oliver Gerdes,

Defendant-Appellant

Appeal from
Circuit Court
Coles County

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CRAVEN, J.:

In December of 1960, the defendant was unable to get his automobile started. The car was a 1953 Pontiac. He called F. & S. Motor Sales in Charleston, Illinois, to come and get the car. The plaintiff, Leon Hall, employed by F. & S. as its parts manager and part-time wrecker driver, together with Phillip Carter, a part-time employee of F. & S., responded to the call in the company wrecker truck.

On arrival at the home of the defendant, at around 4:00 P.M., the two F. & S. employees and the defendant had a general discussion as to the difficulties in starting the car, and at that time the defendant states that he told both the automobile had no foot brake but did have an emergency brake.

Carter acknowledges the conversation but Hall, in his testimony, stated that he heard nothing about bad brakes.

Hall, who was in charge of the service call, determined to pull the car on four wheels rather than lift it on the boom and pull it on two wheels. He and Carter hooked the front end of the car to the rear end of the wrecker with a chain. Hall and Carter were in the wrecker and Gerdes was in the car and steered it as it was being pulled away. According to Gerdes, Hall directed him to do this. Carter's testimony is not enlightening on this point, but he did testify that he refused to steer the towed car because of the absence of brakes.

The car was pulled, without any effort to start it, for some distance; then Hall stopped the wrecker, got out and went back to the car and told Gerdes they would try to start the car. Gerdes was instructed as to what to do. After further towing of about one-half of a mile the car started. Gerdes signaled, indicating that the car had started, and Hall started slowing down the wrecker. In stopping, it was necessary to slow the car to keep the tow chain from catching in the front wheel of the car. Gerdes put the car in neutral gear and slowed the car by working the emergency brake back and forth.

The car and wrecker came to a stop on the right shoulder of the road. Gerdes put the emergency brake about halfway back. The hand throttle, which had been about halfway out as they were

trying to start the car, was pulled out further by Gerdes. This was done to keep the motor from dying. Thus, the car was stopped, the gearshift on the automatic transmission was in neutral and the engine was running fast.

Hall and Carter got out of the wrecker and were proceeding to unhook the chains. Gerdes started out of the car to assist. The left-front door of the car was about half open and his right hand was on the steering wheel. The gearshift was then either knocked or slipped into gear and the car moved forward, injuring Hall as he was pinned between the two vehicles. The force of the impact pushed the wrecker forward.

The evidence is that the car did jump into gear twice following the accident as it was being used to take the injured Hall into town. Gerdes had owned the car for about four months.

There is testimony in the record that on examination of the car subsequent to the above events, the clutch plates were found to be burned and sticky; the effect of which defect was the same on the motor as if the car were in a "drive" gear.

A jury trial resulted in a verdict for the plaintiff. Judgment was entered on the verdict, post-trial motion denied, and this appeal follows. There is no contention that the verdict of the jury was excessive.

Initially, we are presented with a pleading question for determination. The parties went to trial on the following

allegations of negligence: (a) that the defendant propelled his vehicle forward and against the wrecker, (b) failed to apply his brakes, (c) failed to maintain his automobile in neutral gear, or (d) otherwise failed to guard against forward motion.

After trial and judgment, plaintiff was given leave to amend the complaint to allege negligence in allowing the automatic transmission to become worn so as to cause the clutch plates to engage, failure to apply brakes and negligent acceleration while the emergency brake was only partially applied.

The defendant contends the amendment was an introduction of new issues after judgment, the effect of which was to deny him a jury trial on those issues. We do not agree. The matters set forth in the amendment to the complaint were not new issues but only refinements of the original allegations. The amendment was permissible under sec. 46 of the Practice Act (sec. 46, ch. 110, Ill. Rev. Stat. 1963), which permits amendment after judgment upon terms as to cost and continuance as may be just. Whether to permit amendment is within the discretion of the trial court, and that ruling will not be disturbed on review in the absence of a clear showing of an abuse of discretion.

The allowance of this amendment does not fall into the latter category. The matters set out in the amendment were well within the scope of the issues as tried by both parties.

Indeed, amendment has been permitted at the appellate level. See Booker v. United Sav. & Loan Ass'n, 48 Ill. App. 2d 246, 198 N.E.2d 545.

Also, in the area of an alleged pleading error is the action of the trial court in striking an affirmative defense of assumption of risk. This action by the trial court was not error. In Hensley v. Hensley, 62 Ill. App. 2d 252, 210 N.E.2d 568, the court considered the Illinois authorities as they relate to the doctrine of assumption of the risk. The authorities there considered are substantially the same as those urged in this court. It was there concluded that assumption of risk in this State is only applicable to cases arising between master and servant. We agree with the conclusion, the analysis and the reasoning to be found in the Hensley case and deem it unnecessary to repeat the same at length in this opinion.

Finally, it is contended that the defendant was not guilty of any actionable negligence and that the plaintiff was guilty of contributory negligence. The failure of the trial court to so conclude as a matter of law is asserted as error. The defendant cites Franks v. Interline Freight Co., 290 Ill. App. 597, 7 N.E.2d 912, and urges that the evidence here, as there, establishes, as a matter of law, an unfortunate accident without legal negligence, and concludes that the trial court should have granted judgment notwithstanding the verdict.

In Bartolomucci v. Clarke, 60 Ill. App. 2d 229, 208 N.E.2d 616, we said that a motion for judgment notwithstanding the verdict does not require this court or the trial court to weigh the evidence, to determine its preponderance nor pass upon the credibility of the witnesses. Neither this court nor the trial court may determine, as a matter of law, what is ordinarily a question of fact unless it can be said that all reasonable minds would reach the same conclusion from the evidence and its reasonable inferences. In Piper v. Lamb, 27 Ill. App. 2d 99 (169 N.E.2d 164), the rule is succinctly stated:

> "The general rule is that negligence and contributory negligence are questions of fact for the jury, and so long as a question remains whether either party had performed his legal duty or has observed that degree of care imposed upon him by the law, and determination of question involves weighing and consideration of the evidence, the question must be submitted as one of fact. Peterson v. Hendrickson, 335 Ill. App. 223, 81 N.E.2d 266. Even where the facts are admitted or undisputed but where a difference of opinion as to the inference that may legitimately be drawn from them exists, the questions of negligence and contributory negligence ought to be submitted to the jury--it is primarily for the jury to draw the inference. Denny v. Goldblatt Bros., Inc., 298 Ill. App. 325, 18 N.E.2d 555; Cloudman v. Beffa, 7 Ill.App.2d 276, 129 N.E.2d 286; Pantlen v. Gottschalk, 21 Ill.App.2d 163, 157 N.E.2d 548. In the case of Cloudman v. Beffa, 7 Ill.App.2d 276, at page 284 /129 N.E.2d 286, at page 290/, the court said that as long as a question remains whether either party had observed that degree of care and caution imposed upon him by law,

and the determination of the question involves the weighing and consideration of the evidence, the question must be submitted as one of fact."

In this case there is substantial conflict in the evidence as to certain of the material facts; there is a conflict as to whether or not a warning of the defective brakes was given; there is an uncertainty as to the manner in which the car was propelled forward, and other matters relating to the conduct of the defendant which were resolved by the jury.

Measured by the test of whether there is any evidence which taken in its aspects most favorable to the plaintiff proves or tends to prove a cause of action, we must conclude that the trial court properly denied the motion for judgment notwithstanding the verdict, and its action in so doing is affirmed.

Judgment affirmed.

TRAPP, P.J., and SMITH, J., concur.

No. 65-41

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT.

Abstract



CHESTER D. MEISTER and GRACE MEISTER,
Plaintiffs-Appellants,
v.
CITY OF WHEATON, a municipal corporation,
Defendant-Appellee.

Appeal from Circuit Court, DuPage County

MR. JUSTICE ABRAHAMSON DELIVERED THE OPINION OF THE COURT:

Plaintiffs-Appellants, hereinafter described as the "owners", brought suit in the Circuit Court of DuPage County to declare that the existing Zoning Ordinance of the City of Wheaton was unconstitutional as it pertained to their property and to permit them to use that property for the construction and operation of a gasoline service station. The original complaint also sought, in the alternative, a finding that the City had never validly adopted a zoning ordinance but that point is not raised on this appeal.

The subject property is located on the northwest corner of Roosevelt Road and West Street in the City of Wheaton, having a frontage of 120 feet on Roosevelt Road and 100 feet on West Street.

The present structure located on the property was erected in 1921, prior to the adoption by the City of any zoning ordinance, as a combination gasoline station and small grocery store. In 1923, the City adopted its present Zoning Ordinance, classifying this lot in a Class A--Residential District which restricted the use of the premises

to single family dwellings and certain public uses such as schools, churches, golf courses and public parks. Thereafter, the property continued to be used for its original purpose as a non-conforming use by various members of the same family. Apparently, the business prospered until 1958 when the obsolescence of its facilities caused a marked decline in patronage. By 1962 the station was in a bad state of repair and an application was made by the owners to the City for re-zoning to permit the construction of a new modern service station. That application was denied.

In January of 1964 the tenants operating the station removed their equipment and abandoned the property. Sometime prior to that date the owners had entered into an agreement with the Humble Oil Company for the sale of the property for $45,000 providing it could be rezoned for use as a modern service station. This contract was, apparently, the indirect cause of the abandonment of the property by the last tenants since the owners were unable to enter into a long term lease. The property has remained unused since that time.

In June of 1964 the present suit was instituted by the owners, reciting the refusal by the City in 1962 to re-zone the property and requesting the relief prayed for. On November 20, 1964, a judgment order was entered denying the relief sought and awarding judgment to the City of Wheaton. This appeal followed.

The owners contend that the facts as developed in the trial court establish the unreasonable use of the police powers by the City in the present zoning restrictions and, also, that the City cannot prohibit the continuance of the present, legal, although non-conforming, use of the property. We will deal with each of these contentions in turn.

Both Roosevelt Road and West Street appear to be heavily traveled thoroughfares, regulated at the intersection by automatic traffic lights in operation twenty-four hours a day.

Roosevelt Road is one of the major east-west highways in DuPage County. North of the subject property, on both sides of West Street for at least two blocks, the property is zoned and is either used for single family residence or is vacant. South of Roosevelt Road, again on both sides of West Street, the uses are uniformly residential for approximately 2,500 feet to the city limits. To the west, both sides of Roosevelt Road are vacant or zoned and used for residential purposes for over 1,000 feet to a small neighborhood shopping area at the northwest corner of Roosevelt Road and Sunnyside Avenue; Sunnyside being the first north-south street west of West Street. On the east, the land uses are again residential for over 4,000 feet with the exception of a small non-conforming use as a sign painting shop maintained in a garage behind a residence, a small YMCA building, and the Wheaton High School.

Two real estate experts testified for the owners that the highest and best use of the property would be for a gasoline service station. They also testified that the property was totally unsuited for residential development and, as presently zoned, had no market value whatsoever. If re-zoned, it was the opinion of these experts that this property would have a market value of $50,000 to $75,000.

An expert testified for the City that the highest and best use of the property would be for a single family residence. In his opinion, the property as zoned, had a present market value of $7,000 and would be worth approximately $45,000 if it could be developed as contemplated by the owners.

The opposing experts also differed relative to the effect of a new service station on surrounding properties. One realtor, a witness for the owners, testified that the station would have no adverse effect on adjoining properties, but would on the contrary, enhance their present value. The other stated that the adverse effect of such a service station would be minimal and have application only to the properties immediately adjoining. Wide diversity of opinion also existed as to the needs of the Wheaton community for another gasoline service station.

It is a long and well established principle that zoning ordinances are presumed to be valid and should be disturbed only if, by clear and convincing evidence, they are shown to be arbitrary or unreasonable. Bennett v. City of Chicago, 24 Ill. 2d 270, 273; Jans v. City of Evanston, 52 Ill. App. 2d 61, 67, 68.

The fact that property would be more valuable to the owner if the use restriction was removed is a factor to be considered in evaluating the reasonableness of the particular zoning ordinance. Elmhurst Nat. Bk. v. City of Chicago, 22 Ill. 2d 396, 402. However, it is only one of the numerous significant factors to be considered in the determination of the validity of the restrictions and is not, by itself, decisive. Hartung v. Village of Skokie, 22 Ill. 2d 485, 494.

Among other factors to be considered are the character of the surrounding neighborhood; the suitability of the property for the zoned purpose; the effect on surrounding property if the restrictions are removed; the existing uses and zoning of nearby property; the relative gain to the public as compared with the hardship imposed on the owner. Myers v. City of Elmhurst, 12 Ill. 2d 537, 543, 544; Hartung v. Village of Skokie, supra.

In the case of River Forest Bk. & Tr. Co. v. Maywood, 23 Ill. 2d 560, the Supreme Court was asked to review a decision of the Superior Court of Cook County holding a zoning restriction of the Village of Maywood valid as it applied to the particular property. The lot concerned was located at the intersection of First Avenue and Washington Boulevard in the Village. Both streets are busy thoroughfares and traffic is regulated by automatic lights. The immediate neighborhood was residential in character although there was a forest preserve and athletic field on the opposite side of First Avenue. The owners sought permission to construct a service station and emphasized, in their request, the heavy traffic at the intersection and the disparity in value between residential and commercial uses of their property.

In affirming the trial court, the Court at Page 563 stated as follows:

> "The property in the case at bar is situated on a busy intersection, and there is little doubt that the heavy traffic affects its desirability for residential use, at the same time enhancing its value for commercial purposes. It may also be inferred, from the stipulation, that the values of nearby residences could not be substantially affected by the proposed use. But these considerations are not determinative under the circumstances shown by the present record.
>
> This court has always considered of paramount importance the question whether the subject property is zoned in conformity with surrounding existing uses and whether those uses are uniform and established. (citation omitted). There can be little doubt here that the surrounding area is predominantly residential in character, that this has been its long-established classification and use, and that the subject property is not inappropriate for such use. This, we think, is sufficient to sustain the restriction. The fact that the plaintiff's property might be worth more if a more intensive use were permitted is true in nearly every case where the use of private property

> is restricted by zoning laws and is not of itself sufficient to invalidate the ordinance." (citations omitted)

With the application of these principles to the instant case, we must agree with the trial court that the presumption in favor of the validity of the Wheaton ordinance was not overcome. There is no doubt that the property would be worth substantially more to the owner if the existing restrictions were removed, but, as mentioned in the Maywood case above, such is the fact in virtually all zoning disputes. Of far greater weight in the record before us is the almost uniformly residential character of the immediate neighborhood. Within a quarter mile radius of the property the predominant land use is residential.

We are unable to find that the restrictions imposed are unreasonable or invalid. A zoning restriction, otherwise valid, will not be set aside where, as here, it realistically limits the use of the property in conformity with the character and uses of the surrounding area.

The owners also urge that since their non-conforming use of the premises was never actually abandoned, but only temporarily suspended, that the City has no right to prohibit its continued use. Such an argument might have merit if it were the intention of the owners to continue to operate in the existing structure. However, the owners themselves have indicated that in its present condition the premises are unsuitable for its proposed use and that it will be necessary to construct a new station. Section 31-21 (c) (2) of the Wheaton Zoning Ordinance provides:

> "No building which has been damaged by fire or other causes to the extent of more than fifty per-cent of

> its value shall be repaired or be rebuilt, except in conformity with the regulations of this chapter."

The necessity of razing the entire existing structure by the owners to carry out their intentions clearly falls within the purview of this section. No replacement of that structure can be erected except in conformity with the other zoning restrictions. Boward v. The County of Cook, 27 Ill. 2d 52, 54.

For the reasons stated, the decision of the Circuit Court of DuPage County will be affirmed.

JUDGMENT AFFIRMED.

DAVIS, J. and MORAN, P. J. concur.

Filed March 21, 1966

68 A 2 178

Abstract

NO. 65-74

FILED

MAR 21 1966

HOWARD K. KELLETT
Clerk Appellate Court Second District

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

| | | |
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| THE PEOPLE OF THE STATE OF ILLINOIS,<br><br>Plaintiff-Appellee,<br><br>vs.<br><br>CHARLES SHELTON and WILLIAM DOWNEY,<br><br>Defendants-Appellants. | ) | Appeal from the Circuit Court of Stephenson County, Illinois. |

MR. PRESIDING JUSTICE MORAN DELIVERED THE OPINION OF THE COURT.

The case before us involves a joint appeal arising out of the same trial. The defendant, Charles Shelton, was indicted by the Stephenson County Grand Jury for the offense of attempted arson and attempted arson with intent to defraud the insurer of a certain building in that County. The defendant, William Downey, was indicted only on the charge of attempted arson. A third defendant, Danny Gratton, was also indicted but pleaded guilty prior to trial and was granted probation.

The facts are in serious dispute. The only substantial evidence adduced by the State was the testimony of the defendant, Danny Gratton, an accomplice to the alleged crime. Gratton testified that the defendant, Shelton, offered him $500.00 to burn down a house in the Village of Orangeville owned by one Bernice Beverly. Gratton alleged that he went to the home of the defendant Downey to solicit his assistance in the attempted arson. Later, it is claimed that the defendant Shelton gave Gratton $5.00 to buy gasoline to set the fire. Gratton and Downey then drove to Orangeville in Downey's car. They doused the Beverly house with gasoline and when Gratton lit a match, an explosion occurred and blew him out of the house. The defendant, Downey, allegedly fled in his car, and Gratton was taken to the hospital where he gave a statement to the State's Attorney.

Both Downey and Shelton completely denied Gratton's story. In addition, Mrs. Beverly was called by the court as a witness and completely denied the Gratton statement.

The only other evidence tending to collaborate Gratton's story is the statement of a witness at the scene that he saw a car of the same model as Downey's leaving the scene. A Freeport detective testified that he saw Downey's car parked in Freeport several hours after the attempted arson and that the hood of the car was warm to the touch.

The defendant Downey produced an independent witness, one Ray Springer, an automobile mechanic who testified that he had worked on Downey's car on the night in question and that it could not have been driven to Orangeville.

The jury considered this evidence and found both Downey and Shelton guilty as charged. Subsequently, each defendant was sentenced to a penitentiary term of two to five years.

We first consider Count Two of the indictment as against the defendant, Shelton. Count Two charged in substance the attempted arson with intent to defraud an insurer. The record is clear that the defendant, Shelton, had no interest in the building owned by Bernice Beverly in Orangeville. The State attempted to plug this gap by alleging that an improper relationship existed between Shelton and Mrs. Beverly and that any benefit to Mrs. Beverly was a benefit to Shelton. The only proof on this point was adduced from Mrs. Beverly who admitted that she had given two gifts to Shelton. The State does not direct our attention to any authority to the proposition that this is sufficient to sustain a conviction for arson with intent to defraud. Based upon this meager testimony we find more than a reasonable doubt as to the guilt of the defendant, Shelton, on Count Two of the indictment.

We now direct our attention to Count One and to both the defendants Downey and Shelton. In essence, the only proof against them is the statements of the accomplice, Gratton. Evidence that a car of the same make as Downey's car was seen fleeing the scene and that two hours later Downey's car was found with a warm hood in another city is weak collaboration.

The State's Attorney made constant reference to an improper relationship between the defendant Shelton and Mrs. Beverly. Mrs. Beverly testified that her relationship with Shelton was a business relationship only, and yet the State's Attorney constantly pursued this line of questioning. While the trial court admonished the jury that these statements related only to the defendant Shelton and not to the defendant Downey, in view of their constant repetition it is impossible for this Court to believe that the jury was not prejudiced. A reading of the whole record suggests that the theory of the State, as presented to the jury, was that Shelton was on trial for improper

conduct with Mrs. Beverly and that since Downey was a joint defendant, both were guilty. While the connection between impropriety and arson is vague, we cannot but believe that the alleged impropriety tended to confuse the issues before the jury. Shelton was being tried for such impropriety, as well as for attempted arson. The unwarranted intrusion of such charge into the trial was prejudicial. On several occasions, under the questioning or innuendo of the State's Attorney, the jury and the spectators broke out in laughter. When the liberty of those charged with an offense is at stake, the trial should not be reduced to such a bizarre atmosphere.

We are mindful of the fact that the court and the jury saw and heard the witnesses and are the best judges of their credibility, The People v Mathews, 406 Ill. 35, 42 (1950); The People v Coulson, 13 Ill. 2d 290, 296 (1958). On the other hand, this Court cannot abdicate its responsibility. This record creates a reasonable doubt as to the guilt of the defendants; it reflects the failure of the State to prove the essential elements of the offense and consequently, we must reverse. The People v Heep, 302 Ill. 524, 530 (1922); The People v Jefferson, 24 Ill. 2d 398, 402 (1962); The People v Anderson, 30 Ill. 2d 413, 415 (1964).

The record does not contain, and it is apparent to us that there is not sufficient evidence to convict either of the defendants. We do not feel that a new trial would add substance or clarity to the case, therefore, the judgment is reversed.

JUDGMENT REVERSED

Abrahamson, J. and Davis, J., concur.

March 28, 1966

28 I.A. 2d 159

General No. 10697 Agenda No. 4

STATE OF ILLINOIS

IN THE APPELLATE COURT

FOURTH DISTRICT

| | | |
|---|---|---|
| The People of the State of Illinois, Plaintiff-Appellee | : | Appeal from |
| vs. | : | Circuit Court |
| James Edward Jenkins, Defendant-Appellant | : | Macon County |

Smith, J.

The defendant was found guilty by a jury of the crime of burglary and sentenced to the penitentiary from five to twenty-five years. Through his court-appointed counsel, he now seeks reversal and discharge for the reason that (a) the evidence does not establish his guilt beyond a reasonable doubt, (b) a chisel was improperly admitted into evidence, and (c) a sledge hammer was improperly admitted into evidence. The defendant did not take the witness stand.

The Lyons Lumber Company in Decatur was burglarized during the night of May 7, 1964. During the course of the burglary, a Pepsi-Cola machine was entered, a brick wall was battered, and there was an attempt to enter a safe in

the office of the president. On discovery the following morning, the police and an agent of the Illinois Crime Laboratory began their investigation. During the preceding day, an employee had been assembling a picnic table and placed a metal, table leg brace on it. This brace was manufactured outside of the State of Illinois, was shipped to Decatur in a cardboard container and had been removed from the container around 10:00 a.m. that day. After the burglary, it was found near the Pepsi-Cola machine; a partial palm print was lifted and subsequently identified as that of the defendant by a representative of the Illinois Crime Laboratory. This witness explained in detail the science of identification through fingerprints, footprints, and palm prints, detailed the procedure followed by him and leaves no doubt that the defendant left his unimpeachable identity on the brace. When interviewed by the police six days after the burglary, he first said he had never been to the lumber company and then said that he might have been there at some time looking for work. He did not specify the time or to whom he had talked. It is hardly likely that he would have forgotten these details had they occurred just six days before.

The chisel and sledge hammer in question came from the truck of one Thomas Walker. Defendant and one Kenney, an ex-convict, had used the truck in question on

previous occasions, and had been to the Walker's on the night of May 7 to borrow a battery. Both Kenney and Mrs. Walker testified that Kenney and the defendant did not use the truck that night nor did they take anything out of it. Nevertheless, the sledge hammer had red-brick dust on it and the chisel was present at the scene of the burglary. Experts from the Illinois Crime Laboratory effectively established this fact after detailed qualification by comparing the striations on the chisel with the silicone rubber cast made of the marks on the safe at the scene of the crime. They matched. It is apparent from this record that this was not just coincidental. The presence of a sledge hammer with red-brick dust on it in the Walker truck is unexplained and it seems somewhat unusual. Walker testified that the sledge hammer belonged to his grandmother, but offered no explanation for the red-brick dust on it.

The innocence or guilt of the defendant must be primarily bottomed upon the existence of his palm print on the table leg brace. From the record in this case, the palm print had to have been placed on the brace at the place of its manufacture; during the day preceding the burglary; or during the burglary. The most reasonable conclusion from the record before us is that the time of the burglary and the birth of the prints coincide. The record is devoid of any suggestion that the defendant was employed at the factory where the brace was manufactured. It is devoid of any

suggestion that the defendant was present at the lumber company after 10:00 a.m. on the day preceding the burglary. On the morning after the burglary, the brace had been torn loose from the table leg to which it had been attached and the defendant's palm prints were on it. This evidence stands wholly uncontradicted. The type of calling card left by the defendant could scarcely have been left by someone else. In People v. Franceschini, 20 Ill. 2d 126, 169 N.E. 2d 244, a state's witness testified that the defendant brought the fruits of a burglary to her apartment. Defendant offered no evidence to dispute this witness. Her credibility is somewhat tarnished. She had been arrested several times for prostitution, petty larceny, keeping a disorderly house, and was then under indictment for a different burglary. The conviction was there sustained on this testimony alone. The court observed there that the recent unexplained and exclusive possession of the fruits of a burglary give rise to an inference of guilt and is sufficient to sustain a conviction unless there are other facts or circumstances giving rise to a reasonable doubt in the mind of the trier of facts, be it a court or jury. We think the integrity of this palm print is at least equal to, if not better than the testimony in Franceschini. We entertain no doubt nor did the jury that the defendant was present during the commission of the burglary and participated in it.

No reasonable hypothesis consistent with the defendant's innocence appears in this record. Unless the evidence is so unreasonable, improbable or unsatisfactory as to justify a reasonable doubt of defendant's guilt, we should not disturb the verdict. People v. Hart et al, 323 Ill. 61, 153 N.E. 705; People v. Townsend, 11 Ill. 2d 30, 141 N.E. 2d 729; People v. Lobb, 17 Ill. 2d 287, 161 N.E. 2d 325.

We now come to the admissibility of the chisel and the sledge hammer with the red-brick dust on it. It seems perfectly clear from this record that the palm print and the chisel were together at the scene of the burglary. Each was in bad company. The sledge hammer was in bad company with the chisel in the back of Walker's truck. These circumstances, together with the fact that a heavy instrument had been used to batter the red-brick wall, would reasonably seem to be more than a mere concidence. Defendant had used the truck on previous occasions and was in the truck's vicinity at the Walker home on the night of the burglary and had access to it. The real issue is one of relevancy and relevancy is established if there is evidence to connect the exhibit with the crime and with the defendant. "The connection may be circumstantial.... While possession furnishes a means of connecting the accused with the instrument, it is not essential." Cleary, Handbook of Illinois Evidence, 2d edit. p. 228. The admissibility of the exhibits

does not turn entirely on the question of possession in any technical sense. It is one factor but not the only factor to be considered. People v. Jones, 22 Ill. 2d 592, 177 N.E. 2d 112. While the sledge hammer's participation in the burglary rests on more tenuous grounds than does the chisel, we think this goes more to its weight than to its admissibility. In the face of this record, we see little room to doubt that the defendant, the chisel and the sledge hammer were together at the lumber yard on the night of May 7. We see little reason for either the jury or the court to become doubting Thomases where in the more serious matters of life there would be no occasion to doubt and there exists an abiding conviction of the truth of the charge.

We conclude that the evidence establishes the guilt of the defendant beyond a reasonable doubt and that he had a fair trial free from error. The judgment of conviction is affirmed.

Affirmed.

Trapp, P.J. and Craven, J. concur.

Filed April 5, 1966

NO. 65-106 M

Abstract

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT



| | | |
|---|---|---|
| DONALD GUERRA, Plaintiff-Appellee, | ) | |
| -vs- | ) | Appeal from the Circuit Court of DuPage County, Magistrate's Division. |
| WARREN F. GILKEY, Defendant-Appellant. | ) | |

MR. JUSTICE ABRAHAMSON DELIVERED THE OPINION OF THE COURT:

This appeal is prosecuted from a judgment of the Circuit Court of DuPage County, Magistrate's Division, entered April 9, 1965, awarding the plaintiff-appellee $316.65 damages and denying the defendant-appellant's counter-claim.

The suit was based on an automobile accident that occurred at 8:45 A.M. on September 14, 1964, in the Village of Westmont. Plaintiff had parked his automobile in a diagonal parking space on the north side of Burlington Avenue and briefly visited the local post office. After completing his business, plaintiff returned to his car and, according to his testimony, looked in both directions on Burlington Avenue,

determined that there was no traffic, and backed his car out of the space. At the same instant that plaintiff stopped his car and shifted into "Drive", it was struck in the rear by a vehicle driven by defendant. Plaintiff also stated that the first time he saw defendant's car was after the impact and that defendant's right front door was directly behind his car.

The defendant testified that he had made a turn onto Burlington Avenue from Cass Avenue, 75 to 85 feet east from the point of impact. He did see plaintiff's car before the collision but was unable to stop because of the unexpected and precipitous action of the plaintif Only one other witness testified. She described the accident substantially as recounted by the defendant.

Photographs of the automobiles introduced into evidence indicate that the right side of defendant's car was damaged to a considerable extent. Plaintiff's car appears to have been struck in the center of the rear trunk. The magistrate apparently was persuaded by the photographs and, after commenting on the difficulty of the decision, found, as we have seen, for the plaintiff.

The defendant urges on appeal that the plaintiff was guilty of contributory negligence and that the decision was against the manifest weight of the evidence. We do not feel that it is necessary, however, to rule or comment on defendant's contentions.

The plaintiff has filed neither an appearance nor answering brief to this appeal. In such instances, the reviewing court is authorized to reverse the decision of the trial court without further

consideration. Tabron v. Pleasant, 64 Ill. App. (2d) 367; Meilach v. Guillaume, 63 Ill. App. (2d) 103; Wieboldt Stores, Inc. v. Mautner 61 Ill. App. (2d) 368.

JUDGMENT REVERSED.

Moran, P. J. and Davis, J. concur.

50422

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
v.
THEODORE YOUNG,
Defendant-Appellant.

APPEAL FROM THE
CIRCUIT COURT
OF COOK COUNTY

MR. JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT:

This appeal comes from a judgment entered in the Circuit Court of Cook County, Criminal Division, May 1, 1964, finding the appellant guilty of the crime of illegal possession of narcotics. This appeal is based on the denial of the Court below of the appellant's motion to suppress the evidence on the grounds that it was illegally seized.

It is well settled law that a person may be searched and evidence seized without a warrant if the search and seizure are made incident to a lawful arrest. Ill. Rev. Stat. (1963) Chap. 38, Sec. 108-1, People v. McCracken, 30 Ill.2d 425, 197 N.E.2d 35 (1964). The lawfulness of the arrest will turn on the question of whether the arresting officers had reasonable grounds for believing a crime was being committed and they have reasonable grounds for believing that the person searched has committed it. People v. McCracken, supra. Whether the arrest was reasonable must, of course, depend upon the facts of each case.

The evidence brought forth at the hearing on the motion to suppress the evidence was as follows:

William A. Parker, a police officer assigned to the narcotic section of the vice control division of the Chicago Police Department, testified that he had spoken with an unidentified police informer on or about June 15, 1963. He stated that he had spoken with this informer "on numerous occasions" prior to this date. He was then asked, "The information or conversation that he gave you on prior dates, did that information lead to arrests of any persons"? Officer Parker replied, "Some of the information received from him, that is correct."

Officer Parker testified that he had known this informer for four years and said that this informer's information had been reliable in the past. The record then shows an objection by the appellant's attorney.

"Object, your Honor. Sometimes it resulted in arrests and sometimes it didn't. That was his statement. How is it going to become perfectly reliable?

"THE COURT: All right."

The questioning of the officer then continued, and it is not clear from the record whether the Court's "All right" was to sustain the objection or to tell the assistant state's attorney to go ahead. No point is made of it on this appeal.

Officer Parker testified that pursuant to this information received from the informer he went with his partner, Detective Robert H. Jarrett, to the vicinity of 45th and Woodlawn. He stated, "Upon arrival there, we placed the area under surveillance at which time I observed two known alleged drug peddlers about whom I had received information in the company of another man who is now known as the defendant, Theodore Young." He said that the three people entered a 1957 Dodge automobile and that he observed the driver turn around and pass something to the appellant. The car then drove off with the police following. Shortly thereafter the policemen made the Dodge pull over and it was stated that when the Dodge stopped, the appellant jumped from the back seat and began to run. He stopped when the police ordered him to. Eight tinfoil packages of narcotics were found in the appellant's right sock.

On cross-examination, Officer Parker said that the information he had received from the informer did not apply to the appellant, but concerned the activities of the other two people in the car. This witness also stated that he did not actually see anything pass from the hand of the driver to the hand of the appellant, but said that he saw the hands come together as if something were being passed from one to the other and that he assumed something in fact had passed. It was also brought

out in cross-examination that the appellant had gone but a few feet when the police officers told him to stop.

On redirect examination the police officer said his information was that two persons, "Slick and Cladie B. were dealing in narcotics from an automobile which was a 1957 red and white Dodge in and around the vicinity of 47th and Calumet. It was also at the time stated that if anyone was seen in the car with them, they were no doubt copping." It was stated that the police officers went to 45th and Woodlawn because they knew that was where Slick lived.

The appellant argues that the reliability of the informer was never established. Without arguing it as a separate ground for reversal, the appellant also urges that the police did not have reasonable grounds for believing a crime was being committed. The basis of the appellant's argument is that the officer had stated that some of the information received from the informer had led to arrests. Obviously, they say, other information did not lead to arrests. They conclude from this that the other arrests were not made because the information was inaccurate. As a result, this informer cannot be said to be reliable. So runs the argument.

We shall quote from the People's brief that portion which responds to this argument of appellant.

> "There are many considerations which affect the ultimate decision of when to make an arrest, or whether to make an arrest at all. Sometimes information is received by an informant relative to a planned sale not involving the informer himself. After the informer gives this information to the police, the involved parties alter their plans and select a different time or place more suitable to their convenience. Does the fact that the parties altered their plans mean that informant was unreliable? Informers engage in a risky occupation and the subjects with whom they deal do not make their arrangements to suit the informer's convenience. For these reasons, an informant's reliability should not be subject to some mathematical batting average of arrests versus non-arrests; the test should be based on other criteria. The fact that in the past the informant had given information which resulted in arrests being made and that Officer Parker considered him to be reliable are indicative that he was in fact reliable."

We agree with the People to the extent that the law does not demand that to be considered reliable, information given by an informer must lead to an arrest every time. Draper v. United States, 358 U.S. 307 (1959).

The two persons concerning whom the officers had information were seen in the automobile described by the informant. It is true that the police did not make an arrest at the place described by the informant, for they proceeded directly to the block where one of the reputed dope peddlers lived. We do not feel that this weakens the People's case. It is also true that the police did not have any information specifically dealing with this appellant, but if two people are selling narcotics, someone must be buying it. We feel the police were justified in concluding that the driver of the car gave something to the appellant when they saw their hands meet. It is not necessary that they actually see the object pass from hand to hand.

The People also stress the fact that the appellant began to run when the car in which he was riding was stopped by the police. They cite the following from the recent case of People v. Brooks, 32 Ill.2d 81, 203 N.E.2d 882 (1965), "In our opinion the collective facts of the informer's tip, the appearance and demeanor of the defendant, and the words, actions and flight of the stranger were sufficient to lead a reasonable and prudent person to conclude that the defendant was in the commission of a criminal offense."

The appellant urges that since he had gone but a few feet when he was ordered to stop, it was impossible for him to have been running, and that the police could not, therefore, properly conclude that he was fleeing. We believe the police were qualified to determine whether the appellant was trying to run away.

The appellant cites several cases from the Supreme Court of the United States which he claims would preclude an arrest made under the fact situation here. In Wong Sun v. United States, 371 U.S. 471 (1963)

the original informer never testified at the trial and there was nothing in the record which would tend to establish his reliability. In that case there were no independent actions observed by the police which would enable them to bolster their information with independent observation.

In Beck v. Ohio, 379 U.S. 89 (1964) police officers had received unspecified information and reports regarding the petitioner. The Court there noted the meager record and that there was nothing about what the reports were or who the informer was. Aguilar v. Texas, 379 U.S. 108 (1964) dealt with a case where the police officers obtained a state search warrant on the basis that "Affiants have reliable information from a credible person..." There was nothing further concerning the informant or the reliability of his information.

As opposed to these cases, Officer Parker testifed that the informant's information had been reliable, and that it had led to arrests. The substance of the information was made known at the hearing. The officers made personal observations which supported the information received. We feel the facts of this case are substantially different from the facts of those cases where the Supreme Court of the United States has held that the evidence was obtained through illegal search and seizure. For the foregoing reasons the judgment is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J., and LYONS, J., concur.

50299

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| W. W. DURHAM & CO., INC., an Illinois corporation, | ) | |
| Plaintiff-Appellee, | ) | APPEAL FROM THE |
| vs. | ) | CIRCUIT COURT OF |
| RELIANCE UNDERGROUND CONSTRUCTION COMPANY, INC., an Illinois corporation, f/k/a DI VITO CONSTRUCTION COMPANY, | ) | COOK COUNTY. |
| Defendant-Appellant. | ) | |

MR. JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT.

In this suit on defendant's promissory note, judgment by confession was originally entered in favor of W. W. Durham & Co. and against Reliance Underground Construction Co. formerly Di Vito Construction in the amount of $48,074.99. On motion of the defendant, alleging that the note had been fully paid, this judgment was subsequently opened up for further proceedings. After the submission of pleadings, affidavits, and depositions by both sides, the trial court entered summary judgment for the plaintiff in the amount of $36,563.12, and reserved for further determination the validity of the plaintiff's claim to the balance of the original judgment, and found that there was no just reason for delaying enforcement of or appeal from the order. The order also granted leave to the plaintiff to file an additional count, seeking recovery of $39,118.48 allegedly owed by the defendant to the plaintiff on open account since the execution of the note.

At the time the judgment by confession was entered, garnishment proceedings were commenced against the Oak Park National Bank, which reported that it held funds belonging to the defendant in the amount of that judgment plus costs, or $48,111.99. We note that the garnishee has been ordered by the trial court to retain that sum pending the disposition of this appeal.

Reliance argues on appeal that where the pleadings, affidavits, and depositions raise an issue as to a material fact in the case, a motion for summary judgment should be denied. Ray v. The City of Chicago, 19 Ill. 2d 593, 599, 169 N.E.2d 73. Sub-section 57(3) of the Civil Practice Act, which deals with procedure on motions for summary judgments and decrees, states in part:

> The judgment or decree sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment or decree as a matter of law....(Ill. Rev. Stat., ch. 110, §57(3)(1963)).

Durham agrees that this is the test which we must apply to the record in reviewing the trial court's summary judgment order, but argues that no issue of fact was raised in this case. Reliance contends that the affidavits of its president, Eugene C. Di Vito, set up valid defenses to the entire note and disclose a number of substantial issues of fact upon which the defendant was entitled to a trial by jury. It is necessary, therefore, to review briefly the allegations made in the pleadings, affidavits, and depositions in this case.

Prior to the entry of summary judgment, defendant set forth twenty-two separate items which allegedly should have been applied by the plaintiff to the note. As to sixteen of these, defendant's president admitted in a deposition that the checks bore notations placed there by his employees indicating that the payments were to be applied to obligations unrelated to the note. Subsequent to the taking of Di Vito's deposition, the defendant did not again allege that those sixteen items should have been applied to the note, nor has it been so argued on appeal.

Another of the twenty-two items was the defendant's check

for $10,000, made payable to the order of plaintiff's president. Plaintiff claimed this check constituted a personal loan, but defendant contended it must be applied against the note. The trial court reserved for further determination the question of whether or not that amount should be applied to the note, and that amount (plus interest) constitutes the difference between the summary judgment and the judgment by confession. It was thus excluded from the summary judgment, and is therefore not before us on appeal.

The trial court apparently concluded that the defendant's allegations as to the other five items raised no questions of fact, and it is this conclusion which is the focus of this appeal. Three were checks totalling $12,350.00, which Di Vito alleged plaintiff was instructed to apply to the note. Plaintiff denied that any such instructions were given, and alleged that those checks were applied to the defendant's open account with the plaintiff. But defendant countered that the statements of that open account, which were submitted by plaintiff from time to time, never showed the application of those checks to the open account.

The fourth item was an alleged agreement between the parties, following an audit and a meeting on April 3, 1963, that defendant's indebtedness to plaintiff had been overstated by $11,668.15. This claim for overcharge on the note was predicated on the claim by Reliance that in many of the involved premiums they were charged at the rate for tunnel work, but much of the work was not tunnel work and should have been charged at a much lower premium. The plaintiff alleged that the parties had agreed upon this amount merely as a settlement offer, contingent upon payment of the balance due, and that the offer was never accepted. It was also claimed by Reliance that policies for which they were billed were never delivered.

The final item concerned an allegation by the defendant that the indebtedness covered by the note included insurance policies which were never delivered to the defendant, and that therefore the amount due under the note must be reduced by $8,222.51. Plaintiff argues on appeal that the policies in question were issued long after the note was made, and therefore are unrelated to the summary judgment on the note.

Under these circumstances, we are forced to conclude that triable issues of fact exist, and therefore the case must be resolved by a trial on the merits and not by way of a summary judgment. Summary judgment should only be granted in those cases where the right to it is clear beyond question. Solone v. Reck, 32 Ill. App. 2d 308, 311, 177 N.E.2d 879. We direct that all of the claims of the plaintiff against the defendant be adjudicated by a jury, and that the funds held in the garnishment proceedings be kept under the supervision of the Court until the matter has been finally adjudicated.

The claim is also made by the defendant, Reliance Underground Construction Co., Inc., that no judgment can be entered against it on the note because the note was signed by its predecessor, Di Vito Construction Co., Inc. This contention was not raised in the trial court, and has been raised for the first time in the briefs on appeal. In any case, we think it is of no merit. Defendant's president, Eugene C. Di Vito, admitted in his deposition that at the time of the change Reliance absorbed the liabilities as well as the assets of Di Vito Construction Co., Inc. The change appears to us to be little more than a change of names, with the business itself and the parties in interest remaining unchanged.

We conclude that the Circuit Court erred in granting plaintiff's motion for summary judgment, and therefore the cause is remanded with directions that the issues be tried by a jury.

REVERSED AND REMANDED WITH DIRECTIONS.

KLUCZYNSKI, P.J., and MURPHY, J., concur.

Abstract only.

50482

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| PAUL V. BYRNE, JR., Plaintiff-Appellant, | ) | APPEAL FROM |
| v. | ) | CIRCUIT COURT OF |
| THE FIRST NATIONAL BANK OF CHICAGO, Defendant-Appellee. | ) | COOK COUNTY. |

MR. PRESIDING JUSTICE DRUCKER DELIVERED THE OPINION OF THE COURT.

Plaintiff, as a cestui que trust, brought an action for damages against the defendant, as trustee, alleging that the defendant breached its fiduciary duty in withholding the trust res in violation of the terms of the trust agreement and in dealing with adverse parties without advising or informing the cestui. The trial court entered an order granting a summary judgment in favor of the defendant. Plaintiff appeals from the denial of his motion to vacate that order.

The undisputed facts as set forth in the pleadings and affidavits are as follows: Ella Byrne was a life beneficiary of a trust administered by the defendant, the assets of which were distributable upon her death to her children, one of whom is the plaintiff. She died on April 20, 1964. On April 22, 1964, defendant distributed $200 to the plaintiff from the assets of the trust and on April 23 plaintiff received an additional distribution of $4,000, leaving only the securities of the trust to be distributed. Defendant immediately contacted the five beneficiaries of the trust (one of whom resided in California) to determine whether the beneficiaries desired distribution of the shares of stock in kind or in cash. Upon approval by all the beneficiaries of the plan of distribution in kind defendant proceeded to have the various securities transferred into their respective names. On May 8 certain securities which had been transferred to the plaintiff's name and returned to the defendant

were distributed to him, and the only securities remaining in the trust on that date for distribution to the plaintiff were those which had not been returned to the defendant from the respective companies or their transfer agents.

In June 1963 Jean Byrne (plaintiff's wife) filed an action against the plaintiff herein for separate maintenance and a decree therefor was entered in November. On May 7, 1964, the defendant herein was served with a notice of motion and copy of a petition that plaintiff would request a court injunction restraining and enjoining it from paying or delivering to the plaintiff herein any monies, certificates of stock or credit by reason of any beneficial interest possessed by the plaintiff under or by virtue of the trust. Although plaintiff contends that he received no notice of this proceeding, the notice of motion served on defendant was addressed to both the defendant and Paul Byrne, Jr. The injunction order was entered by the court on May 11.[1] On May 13 another order was entered enjoining the defendant from delivering to Paul V. Byrne, Jr., any other property which it still had in its possession. The defendant complied with that court order though it was not made a party in the aforesaid proceeding.

Plaintiff contends that on the day after Ella Byrne's death the defendant "could have and should have" distributed the estate, that defendant "devised a scheme by which the distribution was made contingent on the whim of other beneficiaries, and by reason of

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1. When the securities were delivered to the plaintiff on May 8 the trust department of the bank had not been aware of the pending proceedings. On May 13 the court ordered Paul Byrne, Jr., to return to the trustee the securities delivered to him on May 8, but this order was rescinded by the order of July 7 which allowed him to retain those securities.

these dilettante provisions of such scheme was not able to distribute until May 8, 1964, when it made partial distribution, but refused to make complete distribution." Plaintiff alleged no facts in his complaint to support these accusations. Plaintiff also contends that since a trustee has a duty to protect and defend the trust res and also to keep his cestui informed of all matters which might affect the value of the trust property, that therefore the defendant should have notified him of the proceeding and also should have intervened therein to inform the court that it was hindering distribution of the remaining trust property.

Trustees are bound in the management of all the matters of the trust to act in good faith and employ such vigilance, diligence and prudence which ordinary men would exercise under like circumstances in dealing with their own affairs. Harris Trust and Savings Bank v. Wanner, 393 Ill. 598. Upon termination of the trust the trustee has the power only to perform such acts as are necessary to the winding up of the trust and the distribution of the trust property. Breen v. Breen, 411 Ill. 206. By its express terms the trust in the instant case terminated at the death of Ella Byrne on April 20, 1964. When defendant's trust department received notices of the aforementioned petition and order, less than one month after the termination of the trust, the only trust assets remaining for distribution to the plaintiff were shares of stock which had not been returned from the respective companies or their transfer agents. Upon receipt of these securities the defendant was required to observe the aforesaid injunction although it was not a party to the proceeding. In American Zinc Co. v. Vecera, 338 Ill. App. 523, the court at page 530 stated that:

> All persons having notice of an injunction are required to observe it. (Citing cases.) A person who participates in acts prohibited by an injunction may be committed for contempt, although he is not a party to the litigation nor named in the order granting the injunction. (Citing cases.)

Though a trustee does have a duty to protect and defend the trust property (Holyoke v. Continental Ill. Nat. Bank & Trust Co., 346 Ill. App. 284), the suit brought by Jean Byrne for separate maintenance was a personal action against Paul Byrne, Jr., and was not a direct attack on the trust property. Therefore the trustee was under no duty to intervene for any reason in that proceeding. Certainly the trial court was aware that it was delaying final distribution of the trust property since it issued the injunction. Moreover, since the aforesaid action was personal against Paul Byrne, Jr., only the plaintiff in that proceeding was required to give notice thereof to him and no such duty devolved upon the trustee.

We find that there is no genuine issue as to any material fact and that the defendant did not breach any duty imposed upon it as trustee. A motion for summary judgment is properly granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Murphy v. Cory Pump & Supply Co., 47 Ill. App. 2d 382. Therefore, since the order granting the summary judgment was proper, the judgment of the Circuit Court is affirmed.

AFFIRMED.

ENGLISH and McCORMICK, JJ., concur.

Publish abstract only.

49976

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| PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. PEDRO R. GARCIA, Defendant-Appellant. | ) | APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY CRIMINAL DIVISION |

MR. PRESIDING JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT:

This is an appeal from a judgment entered April 30, 1964 in the Circuit Court of Cook County upon a jury verdict finding the appellant guilty of armed robbery. Appellant received a sentence of from three to ten years.

On January 14, 1962, the Chicago Athletic Association was robbed by three armed men wearing mufflers over their faces. Two days later, one of the employees of the Club, Donald Brown, admitted being part of the plot to commit the crime and named the three men who performed the actual robbery. One of the men named was Pedro Garcia, the appellant. Later, Brown selected a picture of Garcia from police files and stated that this was the Pedro Garcia of whom he spoke. The appellant was arrested in New York about 16 months later, waived extradition and voluntarily returned to Chicago with Chicago Policemen. For two days and one night appellant was driven from New York to Chicago by representatives of the Chicago Police and upon arriving here signed a confession.

At trial the defense theorized that the police had arrested the wrong Pedro Garcia. It was claimed that the name is a common one in Puerto Rico and that the police were not careful whom they arrested as long as he had the right name. Appellant contended that he was in New York at the time of the robbery. No witnesses were brought forward to confirm this claim.

It is claimed that appellant was prejudiced in that the People argued a fact to the jury which had not been adduced as evidence. The People admit this was error, but claim that no prejudice could have

resulted from it. The record shows that when the appellant claimed he was the wrong Pedro Garcia he was asked if he had lived on Halsted Street. The appellant replied that he had lived in Chicago some years before and had lived somewhere on Halsted Street, but could not remember the address. The assistant state's attorney then asked "You wouldn't know where Donald Brown got the address of 1709 North Halsted Street?" No one ever testified at the trial that Donald Brown mentioned that address at any time. Again, during closing argument, the assistant state's attorney mentioned that Brown had given Garcia's address as 1709 North Halsted. No objections were made either time to the mention of the Halsted Street address. In view of the fact that Brown identified the appellant at trial as the man of whom he was speaking when he gave the names of those who participated in the robbery, the fact that an address was mentioned before the jury cannot be deemed prejudicial. Had an objection been made it undoubtedly would have been sustained.

It was argued in the brief for appellant that the Court committed reversible error by permitting the prosecution to introduce into evidence a police photograph of the appellant. This claim was waived on oral argument.

Finally, it is urged that the Court erred in not conducting a hearing on the voluntariness of the confession before it was admitted as evidence. The People point out that appellant did not prior to the trial move to suppress the confession on the ground that it was not voluntary as required by Sec. 114-11 of the Code of Criminal Procedure. Appellant, however, points to the case of People v. Jackson, 31 Ill.2d 408, 202 N.E.2d 465 (1964) for the proposition that even if no pre-trial ruling is sought, the Court must hear evidence concerning the circumstances under which the confession was given. In Jackson, however, the defendant had testified that the police beat him until he confessed. The Supreme Court said that under the circumstances of

that case the Court should have heard the proffered evidence.

In the case at bar there was an objection to the admission of the confession on grounds that appellant was not allowed to testify as to the length of time he was in custody before it was made. The record shows that the appellant had been in the custody of the representatives of the Chicago Police Department for two days and one night while they were driving from New York to Chicago. Under these circumstances the expiration of that time alone cannot be used to draw an adverse conclusion regarding the voluntariness of the confession. The testimony of the appellant concerning the giving of the confession discloses no claim of wrong doing by the police such as was made in the Jackson case, supra. We believe the facts of this case are sufficiently distinguishable from those of Jackson to warrant affirming the judgment entered below.

For the reasons above stated, the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

LYONS, J., and BURKE, J., concur.

50252

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

v.

MONROE KANE,
Defendant-Appellant.

APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY, CRIMINAL DIVISION.

A

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT:

This is an appeal from a conviction for the crime of attempt to murder with sentence in the Illinois State Penitentiary for a period of fifteen to twenty years.

Officer James Heslin of the Chicago Police Department testified that about 8:00 P.M. on May 10, 1964, while in uniform and driving a squad car on patrol duty, he noticed a crowd of twenty people in the street; that a disturbance was being caused by defendant at an alley near 3815 West End Avenue, Chicago; that defendant was shouting and cursing; that he told defendant to get off the street and make no more disturbance; that defendant started to walk west on West End Avenue to a point about four or five house lengths away, then walked back east and went south through the alley; that Officer Heslin pulled the squad car into the alley, got out, called Kane and repeated his instruction; that when defendant declined to obey, he put him under arrest and searched him; climbed into the squad car and used the radio to call for a squadrol, whereupon, defendant ran north through the alley back to West End Avenue; that Officer Heslin gave chase and defendant stopped, turned around, and hit him in the face with some hard object, causing Officer Heslin to become momentarily groggy, that he felt a tugging at his service revolver and saw defendant's hand trying to take it, but the revolver would not come out because of a strap behind the hammer; that he saw the hammer go back and forth five or six times while he and defendant struggled, and that the gun did not discharge.

Officer Heslin further testified that they fell to the ground, still fighting; that they fought in or near the alley and a

vacant lot about twenty feet from the street; that after falling to the ground he continued to receive blows on the face and that during the struggle, the gun came out and he and defendant fought for it; that he got the gun into his hand with defendant on top of him; that defendant placed a finger on top of his, Heslin's, finger (which was on the trigger) and forced the weapon back toward his, Heslin's, face (Emphasis supplied); that he put his thumb under the rear of the hammer to prevent the gun's discharging; that defendant twisted the gun from his hand; that he grabbed it again, whereupon two men observing the struggle took the gun; that defendant jumped up, ran into an alley and fled; that he gave chase in the alley; and that he received a deep laceration on his forehead from the struggle, which necessitated his being in the hospital about four days.

Two other police officers testified they arrived on the scene about 8:00 or 8:15 P.M., as defendant ran away; that they called on defendant to halt; that they chased defendant about a half or three quarters of a block from the alley; that defendant struck one of them; and that both struggled with defendant and subdued and handcuffed him. One of the two other officers noted that he and his partner had to struggle with defendant, after being handcuffed, in getting defendant to their parked car; that twice defendant tried to get away; and that defendant was placed in a squadrol and taken to Bridewell Hospital.

Marie Moore, defendant's mother, testified that she was sitting in a window of her sun porch about 3:00 or 4:00 P.M. on the day in question when she saw defendant come into the alley and go into a basement door; that she saw a police officer approach, throw his flashlight into the door, and order someone out; that defendant came out and threw up his hands, though the officer did not have his gun out; that she saw the officer prod defendant over to the police car where she heard the officer tell defendant to put his hands on the car, which he did; that she heard defendant protest his innocence; that the officer

then tried to shove defendant into the car; that defendant wheeled about and pushed the officer, got behind him and grabbed his arm; that the two struggled in a yard and fell to the ground; that she screamed for help, and a man ran over to the men who were fighting and secured the gun which the policeman held; that defendant had been beating the policeman's gun hand; that defendant did not take the gun, but was only holding the officer's arm. (Emphasis supplied.) This was the only testimony the defense offered.

In rebuttal to Marie Moore's testimony that the incident occurred at 3:00 or 4:00 P.M., Officer Heslin, the victim, testified he reported for work at 6:00 P.M. and got in his squad car at 6:30 P.M. Officers Prosser and Russo testified they reported for work at 6:00 P.M. and placed the time they first got in the squad car at 6:30 P.M. and 6:25 P.M., respectively.

Defendant's theory of the case is, (1) that the trial court committed error in refusing to grant his Motion in Arrest of Judgment, and (2) that the evidence failed to prove him guilty of the crime of attempt to murder, beyond a reasonable doubt.

In support of his first contention, defendant alleges that the indictment was insufficient in that it failed to state the exact time or place of the offense and that this defect was properly raised by a Motion in Arrest of Judgment. In support of defendant's first allegation, defendant reasons that strict compliance is required by Chapter 38, Section 111-3(a)(4) of the Illinois Code of Criminal Procedure. We disagree with defendant's position. This provision states:

> § 111-3. Form of Charge.
>
> (a) A charge shall be in writing and allege the commission of an offense by: . . .
>
> (4) Stating the time and place of the offense as definitely as can be done; and . . .

This provision was construed in People v. Blanchett, 55 Ill. App.2d 141, 204 N.E.2d 173 (1965), where the court decided that an

indictment was insufficient. Since the oral argument was heard in this court, however, Blanchett has been reversed by the Supreme Court. People v. Blanchett, 33 Ill.2d 527, 212 N.E.2d 97 (1965). Furthermore, in People v. Petropoulos, 59 Ill. App.2d 298, 208 N.E.2d 323 (1965), in a well reasoned opinion, it was held that stating the time and place of an offense no more definitely than having occurred on a certain calendar date and within a particular county in Illinois was sufficient.* This case has been affirmed by the Illinois Supreme Court in No. 39377, opinion filed January 25, 1966. We hold that the indictment was not defective. Thus, we do not have to consider defendant's allegation that the insufficiency of the indictment was properly raised by a Motion in Arrest of Judgment.

Defendant's second contention is that he was not proved guilty of the crime of attempt to murder, beyond a reasonable doubt. Defendant alleges that the testimony of Mrs. Marie Moore raised a reasonable doubt of guilt. Defendant points out that Officer Heslin testified that defendant placed a finger on top of his, Heslin's, finger, which was on the trigger, and forced the weapon back toward his, Heslin's, face, while Mrs. Moore testified that defendant only grabbed the officer's arm. Thus, defendant reasons, if the testimony of Mrs. Moore was believed by the trial court, there was an insufficient act to support a conviction of attempt to murder. There was, however, testimony in the record that Mrs. Moore was hard of hearing and had poor eyesight. There was also testimony that she did not have the struggle in sight at all times. There were sufficient reasons for the trial court to find that the testimony of Mrs. Moore was not as reliable as

* This position was adopted by the Illinois Legislature in an amendment approved June 18, 1965, whereby the aforesaid Section 111-3 (4) was amended to read:

"Stating the date and county of the offense as definitely as can be done; and . . ."

that of the officers.

Defendant also alleges that there was evidence in the record that defendant was intoxicated, and that this would negate the specific intent necessary to convict a person of the crime of attempt to murder. There was evidence in the record, Officer Heslin's testimony, that defendant "was acting incoherent." Heslin further stated that when he approached defendant he noticed defendant had been drinking. The defense objected to this conclusion that defendant had been drinking, and the objection was sustained. Thus, the only evidence in the record was Officer Heslin's testimony that defendant was acting "incoherent." The record, however, is replete with evidence that Heslin was acting in a coordinated manner. We conclude that the trial court properly found that defendant was not so intoxicated that he lacked the specific intent necessary for a conviction of the crime of attempt to murder.

The trial court had sufficient competent evidence to support the finding and judgment that defendant's guilt was proved beyond a reasonable doubt.

JUDGMENT AFFIRMED.

BRYANT, P.J., and BURKE, J., concur.

50393

CHICAGO TITLE AND TRUST COMPANY, As Trustee under Trust Agreement dated May 29, 1963, and known as Trust No. 45671,

Plaintiff-Appellee,

v.

THE COUNTY OF COOK, a body politic and corporate,

Defendant-Appellant,

and

VILLAGE OF MOUNT PROSPECT, a municipal corporation, and the VILLAGE OF ARLINGTON HEIGHTS, a municipal corporation,

Defendant-Intervenors-Appellants.

APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS.

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT:

This is an appeal from a judgment in favor of plaintiff in a declaratory judgment action brought to declare the Cook County Zoning Ordinance invalid as to certain property.

Plaintiff is the legal owner of the subject property which consists of an unsubdivided, generally rectangular tract of approximately 8.9 acres, lying on the south side of Dempster Street, 223 feet west of Elmhurst Road. It has a frontage of 517 feet on Dempster Street, although most of the tract is actually 617 feet wide. A parcel of 100 feet by 200 feet improved with a single residence with frontage on the south side of Dempster is excluded from what would otherwise be a rectangular tract. The subject property extends 659.6 feet south of the center line of Dempster Street. It is improved with vacant farm buildings and is zoned R-4 (Single-Family Residence) under the Cook County Zoning Ordinance. Under the terms of the applicable R-4 classification, the subject property could be developed for single-family residences on 10,000 square foot lots.

Directly east of the subject property and extending to Elmhurst Road is a tract of land which is vacant except for a gasoline

filling station on the southwest corner of Elmhurst and Dempster. This tract is also zoned R-4 except for the gas station site which extends approximately 200 feet south of the center line of Dempster and is zoned B-2 (Restricted Service District). Elmhurst Road is the west boundary of the City of Des Plaines. The property south of Dempster and east of Elmhurst is zoned for commercial use under the Des Plaines Zoning Ordinance. East of Elmhurst Road on the north side of Dempster is another small gas station. Extending eastward along Dempster is a substantial single-family subdivision.

West of the subject property, the area south of Dempster is also zoned R-4 to Church Road, the next north-south street, which lies approximately 2,600 feet west of Elmhurst Road. There are nine single-family residences lying on the south side of Dempster west of the subject property and one additional single-family residence is on the east side of Church Road south of Dempster.

The entire area north of Dempster and extending to a Commonwealth Edison right-of-way is zoned R-4 except for the northwest corner of Elmhurst and Dempster which is improved with a gas station and zoned B-2. Just northwest of the subject property on the north side of Dempster is the Dempster Jr. High School. Two single-family residences are located in the area east of the school and west of Elmhurst Road, although the area is used primarily for agricultural purposes. The R-4 area west of the school and extending to Church Road is vacant.

The 38 acre area immediately south of the subject property is vacant and zoned R-5. To the east of that tract and extending to Elmhurst Road is a vacant B-2 area. To the west of the R-5 tract is a vacant area extending to Church Road which is zoned R-4. These vacant tracts are currently devoted to agricultural purposes.

The beneficial owner of the property is the Dawn Fresh Company, which maintained a mushroom farm on the property until about three years before the case was tried. The conveyance to plaintiff in trust took place on May 29, 1963. Kenroy Realty Company entered into a contract with

Dawn Fresh to purchase the property in May of 1963. Kenroy wishes to develop the property for 142 units of multiple dwellings under the provisions of the R-5 Classification of the Cook County Zoning Ordinance, under which one unit is permitted for each 2,500 square feet of lot area.

Application was made to the Cook County Zoning Board of Appeals to reclassify the property from R-4 to R-5. The Zoning Board recommended that the application be denied. The Board of Commissioners of Cook County concurred in the recommendation of the Zoning Board and the application was denied. Thereafter plaintiff filed this action, against the defendant, County of Cook, in which the defendant-intervenors, Village of Mount Prospect and the Village of Arlington Heights, were permitted to intervene as parties defendant.

At the trial, Roy Gottlieb, a real estate broker and vice president of Kenroy Realty, Inc., identified the trust agreement under which plaintiff acquired title to the subject property. Gottlieb testified that Kenroy was purchasing the property at a price of $103,000, including interest, of which $20,000 had been paid; that the balance was due on or before March 2, 1964; that the contract did not provide for refundable deposits; that the contract gave Kenroy the right to rezone, but is not subject to rezoning; and that forfeiture of the funds paid would occur for failure to carry out the terms of an escrow agreement between the parties.

He described the size and location of the subject property, and said he had taken photographs to show the area surrounding the subject property. Gottlieb also stated that Kenroy was not a builder but only brought builders into deals and in this way participated in the construction and development of acreage for multiple dwellings.

Gottlieb also described the proposed development as a series of apartment buildings, consisting of sixteen three-bedroom apartments, sixty one-bedroom apartments and sixty-six two-bedroom units for a total of 142 units with 171 car spaces; that the total area under roof would

approximate 80,000 square feet, which would be approximately twenty-three to twenty-four per cent of ground area coverage; that roads and parking facilities would approximate 70,000 square feet, approximately eighteen to nineteen per cent of ground area coverage; and that the remainder would be lawn and recreational area of approximately 240,000 square feet or sixty per cent of the ground area.

On cross-examination, the witness stated that the plan submitted to the court was not the same as that presented to the Zoning Board of Appeals in that it was not represented to the Zoning Board that three-bedroom units would be built. He further stated that the streets for the subject site are to go along the outer limits of the property; that there are private streets, and approximately twenty per cent of the 8.9 acres is occupied by private streets and parking; that the only access is two roads off Dempster with no access on the southeast or west; that when he entered into the contract to purchase the property he understood that the classification was R-4; that Kenroy will be part of a group that will construct apartment buildings on the site, and intend to retain an interest in the property after the buildings have been put on the site, although there is no contract spelling out its interest; that it will be one zoning lot with no dedication of streets, sidewalks, or utility lines; that there will be private easements and no public improvements; that approximately twenty-six lots could be developed under R-4 and if so developed public improvements would be installed; that public dedication of streets and other public facilities are required under the ordinance; that the market value of the twenty-six lots as subdivided, but before improvements, would be approximately $2,500 per lot; and that the value after improvements would be approximately $5,000.

Lee Perry, assistant vice president of Citizens Utilities Company of Illinois, testified that his company was certified by the Illinois Commerce Commission to furnish water and sanitary sewer in the

area, including the subject property, and that if the facilities were not adequate his company would make them adequate.

On cross-examination, Perry said the company did not provide storm water drainage facilities; that he had not examined the layout of water and sewer lines; that there was a sewer line available to the property and a ten inch water line along Dempster Street owned by his company; that Citizens Utilities does not have a contract or written agreement with the developers; and that he had not made any investigation as to whether the present facilities were adequate.

Donald Gustafson, a civil engineer, testified that the estimated storm water runoff from the property, from a five-year storm frequency, is presently eleven cubic feet per second because of the impervious areas on the property, and the property itself has a difference in grade of approximately ten feet; that from the proposed development plan he examined, he found that the runoff would be increased by about ten per cent; and that the property was not in the flood plain area.

On cross-examination, Gustafson said the storm water eventually runs into Weller Creek and there is not enough capacity in the Creek to handle the area that is tributary to it at the present time, under present conditions of development; that his calculations showed approximately 110,000 square feet of impervious area of pavement, sidewalks or slab; that the corner of the property was near the edge of a flood area shown on the United States Geodetic Survey Map; that under the multiple plan there would be a runoff of twelve cubic feet per second, while under a single-family development, it would be about ten cubic feet per second, but stated, however, that this was based on the existence of the concrete slab on the property that would presumably be removed for a single-family development; that he had not made any investigation as to the capacity of Weller Creek to handle additional storm water; that he had made no investigation of the adequacy of the sanitary sewer based on the present effort to change the zoning and made no independent investigation of the water supply.

George Kranenberg also testified for the plaintiff as a planning and zoning consultant. He stated that he was technical director of the County Zoning Ordinance passed on March 8, 1960, and had recommended R-4 zoning for the subject property; that since 1960, the uses and zoning in the area had greatly changed; that he now thought the highest and best use of the property under current conditions was for multiple-family dwellings; and that he was of the opinion that there would be no depreciatory effect on the uses and its surrounding area by development of a project as described.

On cross-examination, Kranenberg said that since 1960, there has been only one zoning change in the parcels touching the subject property; that the subject property could be developed for single-family use; that the Junior High School was not incompatible with single-family use; that he was familiar with the County Zoning Ordinance and that under the R-5 classification, you can put one structure on a zoning lot; that if there is more than one detached structure, you would have to subdivide; that if the buildings were separated and not attached, the Building Commissioner would not issue a permit; that he did not consider plaintiff's plan when determining the highest and best use of the subject property; that the basic use of the property was not determined by the area west of Church Road; that he thought the services to the property by the County would be less than with a single-family development; that the development would not check existing congestion; that he didn't think 17 units to the acre over-crowded the land; that if the court permitted R-5 zoning on the subject property, the property to the west would not continue R-4; that he thought the entire area along Dempster between Church and Elmhurst should be R-5; that he did not know if there was a demand for multiple units in the area; that he did not investigate the number of vacant multiple units in the area or the number of multiple units in Des Plaines; and that he didn't think the R-4 zoning on the subject property was contrary to the general welfare.

Richard W. Manke, a real estate broker, was the final witness for plaintiff. He testified that the subject property had been used as a mushroom farm, and described the surrounding area; that he was of the opinion that the highest and best use of the subject property was for multiple unit development; and that he thought that the undeveloped parcel would have a value of approximately $25,000 if zoned R-4 and $144,000 if zoned R-5.

M. Eugene Baughman, a city planning and zoning consultant, testified as an expert witness for defendant and the intervenors. He described the subject property and the surrounding area. His opinion of the highest and best use of the subject property was for single-family use, and was based on the location, size and shape of the subject property, the land use in its vicinity, and the general interests and welfare of the inhabitants of the area. In his opinion, the proposed development of 142 units would bring about congestion, result in traffic entering the single-family area to the west and cause congestion on Dempster or any ingress or egress point at Dempster or Route 83, and result in further requests to break down the single-family pattern.

Roger Bardwell, Superintendent of Schools, District 59, Elk Grove Township, testified for defendant and the intervenors, that the subject property and the surrounding area was in his district; that in the spring of 1960, the district had about 1,200 students; that presently (time of trial) it has 5,100 and predictions indicate approximately 6,500 in September of 1964; that the impact of that growth upon the capacity of the district to provide an adequate education has been significant; that there should be some planning in a given area so that all the burden does not fall on a single school; that when rezoning takes place, it increases the burden; that there is sufficient zoning for apartments in the area; that he did a survey which showed on January 16, 1964, there were 4,711 apartment units either under construction or zoning for their construction had been granted; and that an additional

2,017 are proposed pursuant to contemplated zoning changes presently in various stages of petition.

Norman Toberman, a civil engineer, a consulting engineer and director of engineering for the Village of Arlington Heights, testified for defendant and the intervenors, that under its present condition anticipated runoff from the subject property would approximate ten cubic feet per second, based on a five year storm frequency, with a concentration of twenty minutes; that if the property were developed for twenty-five single-family homes, the runoff would be approximately the same; that under the proposed plan for multiple development, the runoff would be seventeen cubic feet per second, or seventy per cent greater; and that the present drainage system on the subject property was not adequate to drain a development such as that proposed.

The final witness for defendant and the intervenors was Raymond S. Wright, a real estate appraiser, who had been in the real estate business thirty-five years. He testified that the subject property was suitable for development for single-family purposes, and described how it could be developed into twenty-four lots. He was of the opinion that the property was worth $96,000 under R-4 zoning. He arrived at that figure by the difference between the cost of improvements and the market value of the lots if improved. He stated the value of the twenty-four lots improved would be $134,000 based on $5,600 per lot with eighty foot widths, the cost of basic improvements around $28,000 and miscellaneous improvements about $9,600. He calculated the number of linear feet of water mains and sewer, and square foot area of roadways and used figures that improvements of that type are being let over today's market. He then calculated a value for the subject property at $126,000, by selling the units on basis of market value for improved and deducting improvement costs, using 110 units with a land value per unit improved at $1,500. Wright was of the opinion that the proposed R-5 development would have a detrimental effect on the remaining vacant

land zoned R-4 in that practically all of the dwellings are single-family residences; that the proposed R-5 use would have a depressing effect on existing homes adjacent to the subject property; and that the effect would be a loss in value of approximately twenty per cent.

He further testified that he made a survey of apartments in the general area; that in the area north of Algonquin and east of Elmhurst Road, the apartments are two and one half to three years old; that in the south half, there are 160 units and thirty-five vacancies; that in the north half, there are 120 units and twenty-five vacant apartments; that to the north there is a newer building one year old with 228 units and fifteen vacancies; and that at the northwest corner of Dempster and Church is a 300 unit development which is one year old and has thirty vacancies. Wright was of the opinion that there is no demand for additional apartments on the subject property and that a development of the subject property for single-family purposes would be readily marketable. He thought the proposed development would increase traffic on Dempster during school hours, when children are going to and from the Dempster Junior High School, and create a greater hazard to the welfare of the children.

In the final judgment order entered June 26, 1964, the trial court declared the County Zoning Ordinance unreasonable and void, insofar as it prevents the plaintiff from constructing or erecting 142 dwelling units on its property as permitted in the R-5 General Residence District of the County Zoning Ordinance.

It is defendant and defendant-intervenors' theory of the case that plaintiff failed to overcome the presumption of validity attaching to the Zoning Ordinance of the County of Cook, and that the trial court should not have substituted its judgment for that of the legislative body responsible for determining zoning boundaries. Defendants also adopt as their theory of the case, that not only is the present single family classification proper in that it promotes the public welfare without

unduly restricting the value of plaintiff's land, but also that the proposed development of the property for multiple-family purposes would harm the public welfare to a degree far in excess of any small increment in value to the land by virtue of such change in zoning classification.

It is plaintiff's theory of the case that the present zoning classification does not permit development of the property for its highest and best use and causes financial loss to plaintiff without any benefits accruing to the public.

In support of defendant's and defendant-intervenors' position, that plaintiff has failed to overcome the presumption of validity attaching to the zoning ordinance, they point out that the subject property is bounded on the north, on the west and on most of the eastern boundary by the R-4 single-family classification and that the only contiguous property zoned for multiple-family purposes is on the south boundary, but that it has lain vacant since the comprehensive amendment to the Cook County Zoning Ordinance was passed in March of 1960.

We are well aware of the fundamental proposition of law that a zoning ordinance is presumed valid, and the party seeking the rezoning must show by clear and convincing evidence that it is invalid. If there is any room for a reasonable difference of opinion, a court will not substitute its judgment for that of the legislative body. Exchange National Bank v. Cook County, 25 Ill.2d 434, 439, 185 N.E.2d 250 (1962). In the recent decision of Jans v. City of Evanston, 52 Ill. App.2d 61, 201 N.E.2d 663 (1964), the court summarized the prevailing rule. At page 67 it said:

> The primary point raised by defendant in this appeal is that plaintiffs failed to over come the presumption of validity which attaches to the zoning ordinance of the city. The law in this area has been clearly defined by the Supreme Court. In the recent case of Bennett v. City of Chicago, 24 Ill. 2d 270, 181 N.E. 2d 96, for example, that court at page 273 stated:
>
> > 'A presumption exists in favor of the validity of a zoning ordinance and the one who attacks such an ordinance has the burden of overcoming the presumption by proving with clear and convincing evidence that, as applied to him, it is arbitrary and unreasonable and is without substantial relation to the public health, morals, safety and welfare. (Emphasis added - citations omitted.)'

> In other words, a party challenging the validity of a zoning ordinance has the burden of showing by evidence that is clear and convincing that the city has abused its legislative discretion in classifying property in a certain manner. Such proof must establish not merely that the property could reasonably be classified otherwise, nor indeed that the court would classify it otherwise; rather, it must show that the legislative decision as to the property is 'clearly unreasonable' (Exchange Nat. Bank of Chicago v. Cook County, 25 Ill. 2d 434, 441, 185 N.E. 2d 250) and a 'clear abuse of discretion' (Trendel v. County of Cook, 27 Ill. 2d 155, 161, 188 N.E. 2d 668).

Thus, we must examine the evidence adduced by plaintiff to determine whether this evidence has overcome the presumption of validity.

Three factors have been relied on by plaintiff to show that the ordinance is unreasonable. Plaintiff first points out that the property would be worth more to the equitable owner, Kenroy, if it was available for R-5 use rather than for its present single-family classification. We disagree with plaintiff. Manke testified for plaintiff that the property was worth $144,000 for multiple use and $25,000 as now zoned, based on improvement costs of $2,000 per lot for single-family use. The contract purchaser Gottlieb, however, in his testimony, indicated that Manke's figure for single-family homes was obviously low.

Gottlieb testified that twenty-six lots could be developed under the present R-4 zoning and that the lots after improvements would be worth $5,000 apiece. Applying Manke's improvement costs, this would yield twenty-six lots with a value raw of $78,000. This compares with the testimony of Wright, defendant's expert, that the property as zoned was worth $96,000. Wright was of the opinion that the property was worth $126,000 if zoned R-5, based on market value, less improvement costs. In giving his opinion of R-5 value, Manke testified he had made no determination of improvement costs for multiple development.

As the record stood when the trial court rendered its judgment, Kenroy had in fact made a down payment of $20,000 in their gamble that the zoning could be changed. They could forfeit the $20,000 and incur no further liability. If the zoning fell, they stood to gain

an increment in land value over the $103,000 paid. This increment could be $23,000 if we accept Wright's testimony or $41,000 if we are to believe Manke. In any event if the contract were performed, Dawn Fresh, the owner, had nothing to gain or lose by virtue of the zoning. If it were not performed, Dawn Fresh would have an additional $20,000 over and above the value of its property for single-family purposes, whether that value be $78,000 or $96,000. Thus, any differential in the value of the property, if used for multiple dwellings, as compared with single-family use, would benefit Kenroy and not the owner of the property.

Even assuming that the subject property would be worth more for the proposed development than for the present use, this, of course, is not determinative on the question of the validity of the restriction. In Cosmopolitan National Bank v. Mount Prospect, 22 Ill.2d 463, 177 N.E.2d 365 (1961), this court sustained a single-family classification where the plaintiff sought duplex residences. The court at page 470 noted:

> The fact that plaintiffs' land would be worth more if the existing zoning ordinance was invalidated is not, of course, determinative. As we pointed out in Bolger v. Village of Mount Prospect, 10 Ill. 2d 596, 602, 'that is true in nearly every zoning case in which the use of property is limited.'

This court made the point succinctly in the case of Jacobson v. City of Evanston, 10 Ill.2d 61, 139 N.E.2d 205. At page 68, the court said.

> From the record, we must conclude that the ordinance imposes no burdens on plaintiff, or his property, that are not common to the hundreds of other property owners and properties within the area included in the designated classification. The mere fact, if it is the fact, that plaintiff's property might be worth more if a more intensive use were permitted, is not of itself sufficient to invalidate the ordinance, as this is true in nearly every case where the use of private property is restricted by zoning legislation. (First Nat. Bank of Lake Forest v. County of Lake, 7 Ill. 2d 213; Miller Brothers Lumber Co. v. City of Chicago, 414 Ill. 162.) Plaintiff's contention that the ordinance is confiscatory and operates to deprive him of his property without due process of law must therefore be rejected.

In First National Bank v. County of Lake, 7 Ill.2d 213, 130 N.E.2d 267 (1955), cited above, this court at 227 said:

> The fact that the property in question may be more valuable if zoned for other uses is not decisive, as this fact exists in nearly every case where the intensity with which property may be used is restrained by the zoning laws. People ex rel. Alco Deree Co. v. City of Chicago, 2 Ill. 2d 350; Miller Brothers Lumber Co. v. City of Chicago, 414 Ill. 162.

Plaintiff next points out that the highest and best use of subject property is for multiple-dwelling use. To support this proposition, the plaintiff offered the testimony of George Kranenberg, a planning and zoning consultant, who so testified. He also testified that the physical characteristics of the property were suitable for single-family use. He also thought the Junior High School was not incompatible with single-family use and that the R-4 zoned property to the west was not incompatible with single-family uses. He further testified that the R-5 zoning on the vacant land to the south would be incompatible to such use, when and if it developed for multiple use, but admitted that the R-5 zoning standing by itself would not render single-family uses unsuitable on the subject property.

Manke, the real estate broker also testified that the highest and best use was for multiple use. He apparently, however, based this on a discrepancy in value, which was inconsistent with Gottlieb's own testimony.

Eugene Baughman, a planning and zoning consultant with substantial experience, testified for defendant and defendant-intervenors that the highest and best use was for single-family use. His opinion was based on the location, size and shape of the subject property and the land use in its vicinity among other factors.

Raymond Wright, defendant's expert appraiser, testified that the property was suitable for single-family development and could be readily marketable as such.

Thus the expert testimony, taken most favorably to the plaintiff, indicates that at best the question of "highest and best use" is debatable. The court should not have substituted its judgment for

that of the legislative body. Trendel v. County of Cook, 27 Ill.2d 155, 188 N.E.2d 668 (1963); Hoffmann v. City of Waukegan, 51 Ill. App.2d 241, 201 N.E.2d 177 (1964).

Nevertheless, even if it is assumed that the record showed that the "highest and best use" of the property was for multiple dwellings, which is clearly not the case here, such a finding would not necessarily render the ordinance invalid. For example, in the case of Elmhurst Nat'l Bank v. City of Chicago, 22 Ill.2d 396, 176 N.E.2d 771 (1961), the court said at page 403:

> Furthermore, although plaintiff submitted evidence that the highest and best use of the subject property was commercial, that factor even if true, is not decisive where there is evidence that the removal of the restriction would lessen values of other property in the area. People ex rel. Alco Deree Co. v. City of Chicago, 2 Ill. 2d 350, 358; City of Aurora v. Burns, 319 Ill. 84.

With respect to "highest and best use," the plaintiff has fallen far short of rebutting the presumption of validity attaching to the ordinance.

Lastly, plaintiff points out that the evidence shows that the classifications within the area are other than the single-family. We disagree with plaintiff. The evidence is clear that the subject property is characterized by the R-4 zoning and uses which abut it on the north, west and most of its eastern boundary. In fact, with the exception of the gas stations on the corners of Elmhurst and Dempster, the entire frontage along both sides of Dempster for the one-half mile between Elmhurst and Church Road is zoned for R-4 use and is improved with nine single-family homes and the junior high school.

The C-2 commercial development in the City of Des Plaines on the east side of Elmhurst Road is almost 300 feet removed from the subject property. The small strip of multiple dwellings in Des Plaines, north of Dempster and east of Elmhurst Road, is even further removed and that multiple development abuts a new and extensive single-family subdivision extending eastward on the north side of Dempster. Nor does the fact that the vacant and undeveloped tracts to the south is zoned for R-5 purposes render the single-family classification of the subject

property invalid. Plaintiff's expert, Kranenberg, acknowledged this fact.

This court has repeatedly emphasized that contiguity or proximity to a different zoning classification does not render single-family zoning invalid. This court has recognized that "zoning must begin somewhere and end somewhere." DeBartolo v. Village of Oak Park, 396 Ill. 404, 411, 71 N.E.2d 693 (1947). Thus in Williams v. Village of Schille Park, 9 Ill.2d 596, 138 N.E.2d 500 (1956), this court sustained a residential classification on a tract abutting light industrial uses, noting at page 598, "so, even though property touches on industrially zoned area, a residential classification is not thereby necessarily precluded."

Thus we conclude that the legislative judgment of the County Board was that this property should be zoned for single-family purposes. Plaintiff has failed to show that the trial court was correct in substituting its judgment for that of the County Board.

Furthermore, as defendants point out, the zoning ordinance, when considered in light of the various guidelines outlined in LaSalle National Bank v. County of Cook, 12 Ill.2d 40, 145 N.E.2d 65 (1957) and Sinclair Pipe Line Co. v. Village of Richton Park, 19 Ill.2d 370, 167 N.E.2d 406 (1960), was a valid exercise of the legislative authority by the Board of County Commissioners.

The factors to be considered in the trial of such cause to determine whether the ordinance is unreasonable are: (1) the existing uses and zoning of nearby property; (2) the extent to which property values are diminished by the particular zoning restrictions; (3) the extent to which limitation or destruction of property values of plaintiff promotes the general health, safety and welfare; (4) the relative gain to the public as compared to the hardship imposed upon plaintiff; (5) the suitability of the particular property for the purposes for which it is now zoned; (6) the length of time that the property has been vacant, as zoned, considered in the context of land development in the

area in which the property is located; (7) the care which the community has undertaken to plan its land use development and (8) the evidence or lack of evidence of community need for the proposed use.

We find that the existing use and zoning of nearby properties is predominantly single-family, that the value of the subject property is not unreasonably diminished by the zoning restriction; that the ordinance promotes the general health, safety and welfare; that the ordinance produces substantial gain to the public while imposing a minimal hardship on the owners; and that the property is suitable for the purposes zoned. We also find that the community has undertaken to plan its land use development in this area and that there is a community need for the use proposed. The record demonstrates that the proposed multiple-family development will adversely effect the public welfare to a much greater degree than any increase in value to the subject site because of the change in zoning classification. There is evidence that if multiple-family zoning was allowed adjacent homes would depreciate in value; that an increase in traffic congestion would arise; that an additional burden would be imposed on the local elementary school district; that the fire protection district, which is presently inadequate, would become more inadequate; and that there would be an overall increase in other municipal services. Finally, there was testimony that a very serious storm water drainage problem would arise if multiple-family development was approved. After considering all the evidence, we find that a change in the present zoning classification would have an adverse effect on the public. The loss, which the equitable owners of the property might suffer, is relatively small.

A motion, filed by plaintiff, was taken with this case, asking the court to take judicial notice of the fact that the Cook County Board amended the Zoning Ordinance of Cook County by changing the zoning classification of 9-1/2 acres located on the west side of Elmhurst Road approximately 541 feet north of Dempster Street in Elk Grove Township

from R-4 (Single Family Residence District) to B-4 (General Service District). The motion emphasized the fact that this property is less than 550 feet from the real estate involved in the instant proceedings and cited Maywood Park Trotting Association v. Harness Racing Commission, 15 Ill.2d 559, 155 N.E.2d 626 (1959).

Generally a reviewing court will adjudge an appeal on the basis of the conditions existing at the time the ruling or decision appealed from was entered and it will not consider matters or conditions subsequently arising. Tangalin v. City of Chicago, 348 Ill. App. 390, 108 N.E.2d 801 (1952). The case cited by plaintiff is inapplicable, in that it reiterates the principle that a reviewing court may properly consider matters occurring after the entry or order appealed from, for the purpose of dismissing an appeal. In the instant case, we are not faced with that problem. The fact that a zoning classification pertaining to nearby property has been changed, subsequent to the entry of a judgment, is not to be considered by us in reviewing the evidence introduced in the lower court.

Furthermore, if we were to consider the change in the zoning classification, on the parcel described in plaintiff's motion, we do not feel that this added evidence, even if construed most favorable for plaintiff, would prevent us from reversing the judgment of the lower court.

The judgment is reversed.

JUDGMENT REVERSED.

BRYANT, P.J., and BURKE, J., concur.